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THE CODE

OF

CRIMINAL PROCEDURE.

THE CODE

OF

CRIMINAL PROCEDURE

(ACT X OF 1882);

TOGETHER WITH

RULINGS, CIRCULAR ORDERS, NOTIFICATIONS, ETC., OF ALL THE HIGH COURTS IN INDIA; AND NOTIFICATIONS AND ORDERS OF THE GOVERNMENT OF INDIA AND THE LOCAL GOVERNMENTS.

EDITED,

WITH COPIOUS NOTES AND FULL INDEX,

BY

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Second Edition,

BY GILBERT S. HENDERSON.

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PREFACE TO THE SECOND EDITION.

MR. JUSTICE AGNEW having, on his appointment as Recorder of Rangoon, declined to take an active part in the preparation of this edition, it has, it is to be regretted, been prepared without his direct assistance. His notes, however, he very kindly placed at my disposal, and from these I have derived much valuable aid.

Since the publication of the former edition, the number of decisions upon the new Code has been very great. Some idea of their number may be gathered from the fact that, although about 78 pages of tabular statements have been omitted from this edition as being unnecessary, the body of the Code itself with the notes upon it covers 493 pages, while in the former edition, with the 78 pages of tabular statements included, it covered only 469 pages, showing an increase of upwards of 100 pages of notes of cases.

No trouble has been spared to make the index as copious and useful as possible.

The Code has been in many important particulars amended by Acts III of 1884 and X of 1886, and the alterations have been carefully noted.

At the suggestion of a number of gentlemen in the Punjab, the decisions of the Punjab Chief Court reported in the Punjab Record have been incorporated.

The notes for the guidance of Police-officers have been considerably amplified. These, with the references to the Bengal Police Manual, will, it is hoped, render this edition of greater service to Police-officers.

The references to the rules and orders of the Calcutta High Court are from the second edition prepared by Mr. Wilkins.

The comparative tables showing the corresponding sections of the new and old Codes have been retained, and will be found as in the former edition at the commencement of the work.

The cases from the Indian Law Reports have been brought up, in the Addenda, to the October numbers (inclusive) of the Reports of the different Presidencies.

I desire to express my thanks to Mr. Gordon Leith, now Officiating Chief Magistrate at Calcutta, and to other Members of the Bar, for many useful suggestions in the preparation of this edition.

G. S. H.

CALCUTTA;
November 15, 1886.

PREFACE TO FIRST EDITION

The object of the New Code of Criminal Procedure is to consolidate and amend the law relating to criminal procedure, which is at present to be found in Act X of 1872 as amended by Act XI of 1874, Act X of 1875, and Act IV of 1877. Most of the provisions of the existing law have been retained, but they have been re-arranged according to a different method. We trust that the comparative tables at the commencement of the work, and the notes appended to each section, will enable the reader easily to ascertain the corresponding sections of the New and Old Codes and Acts.

In preparing this edition, we have endeavoured to give references to all the cases of importance bearing on the subject of criminal procedure decided by the High Courts at the Presidency-towns and by the High Court at Allahabad, and also to give references to the rules, orders, and notifications of those Courts and of the Government of India and Local Governments.

The rules and orders of the Calcutta High Court, we have taken from the edition published under the orders of the High Court in 1881 under the supervision of Messrs. Crawfurd and Wilkins. Those of the Madras High Court are taken from the digest of rulings and orders compiled by Mr. Weir. The rules and orders of the Bombay High Court have been taken from the Circular Order-book published under the authority of the Court in 1871, and amended from time to time, and those of the Chief Court of the Punjab from the Circular Order-book published, under the orders of Government, by Mr. Smyth in 1874. In order to avoid omissions, we have also gone through the Gazettes of the different Local Governments from 1872 to the end of 1881.

We desire to express our thanks to Mr. Whitley Stokes and to the Members of the Legislative Department for furnishing us with all papers relative to the Bill and for allowing us access to the Gazettes. Without this assistance we should have been unable to insert many rules and orders which, we hope, will add to the value of our work.

W. F. A.

G. S. H.

Table shewing correspondence of the section-numbers of the Old Code (Act X of 1872), as amended by Act XI of 1874, with those of the New Code (Act X of 1882).

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12	7, para. 1, cl. 1	41	17, 1, cl. 2
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[1] See Act XI, 1874, s. 1.
[2] Ditto ditto, s. 2.
[3] and [4] See Act XI, 1874, s. 3.
[5] Ditto ditto, s. 4.
[6] See Act XI, 1874, s. 5

Old Code (Act X of 1872).	New Code (Act X of 1882).	Old Code (Act X of 1872).	New Code (Act X of 1882).
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[1] and [2] See Act XI, 1874, s. 6.
[3] Ditto ditto, s. 7.
[4] Ditto ditto, s. 8.
[8] and [9] See Act XI, 1874, s. 12.
See Act XI, 1874, s. 9.
[6] Repealed by Act XI, 1874, s. 10.
[7] See Act XI, 1874, s. 11.
[10] Repealed by Act III of 1884.

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140, cl. (c)	191, para. 1, cl. (a)
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[1] See Act XI, 1874, s. 13.
[2] Ditto ditto, s. 14.
[3] Ditto ditto, s. 15.
[4] See Act XI, 1874, s. 16.
[5] Ditto ditto, s. 17.
[6] Ditto ditto, s. 18.

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[1] See Act XI, 1874, s. 19.
[2] Ditto ditto, s. 20.
[3] [4] and [5] Ditto ditto, s. 21.
[6] [7] [8] [9] and [10] Ditto ditto, s. 22.
[11] Ditto ditto, s. 23.
[12] and [13] See Act XI, 1874, s. 24.
[14] Ditto ditto, s. 25.
[15] Ditto ditto, s. 26.
[16] Ditto ditto, s. 27.
[17] Ditto ditto, s. 28.

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[1] and [2] See Act XI, 1874, s. 29.
[3] Ditto ditto, s. 30.
[4] Ditto ditto, s. 31.
[5] Ditto ditto, s. 32.
[6] See Act XI, 1874, s. 33, para. 1.
[7] Ditto ditto, s. 33, para. 2.
[8] [9] and [10] Ditto ditto, s. 34.
[11] [12] and [13] Ditto ditto, s. 35.

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3	(*e*)
4	(*f*)
5	278, 320
6	278, cl. (*c*)
406, para. 1, cl. 1	320, cl. 1
2	(*a*)
3	(*b*)
4	320, cl. (*c*)
5	(*d*)
6	(*e*)
7	278, 320
8	320, cl. (*g*)
9	(*h*)
10	(*i*)
11	(*f*)
12	(*j*)
406, para. 2	278, 320
3	278, 320
4	462, *Proviso*
407	326
408, para. 1	462, para. 1
2	2
3	3

[1] See Act XI, 1874, s. 36.

[2] See Act XI, 1874, s. 37.

Old Code (Act X of 1872).	New Code (Act X of 1882).	Old Code (Act X of 1872).	New Code (Act X of 1882).
408, para. 4	......	449	231
409, para. 1	328	450	230
2	Chapter VI, - A	451[4]	232
3	Ditto	452	233
410	327	453	234
411	329	454, paras 1 to 3	235
412	330	454, *Ill.* (a)	235, *Ill.* (a)
413	331	(b)	(d)
414	332	(c)	(e)
415, para. 1	523, para. 1	(d)	(f)
2	525	(e)	....
416	523, para. 2	(f)	235, *Ill.* (g)
417, para. 1	524, para. 1	(g)	(h)
2	2	(h)	......
418[1]	517, para. 1	(i)	......
418, *Expln.*[2]	517, *Expln.*	(j)	235, *Ill.* (i)
419	520	(k)	......
420	518	(l)	235, *Ill.* (j)
421	544	(m)	(l)
422	543	(n)	(b)
423	464	454, *Ill.* (o)	235, *Ill.* (m)
424, para. 1	469	(p)	(c)
2	469	455	336
3	464	456	237
425, para. 1	465, para. 1	457	238, para. 1
2[3]	2	457, *Ill.* (a)	238, *Ill.* (a)
426	466	(b)	......
427	467	458	239
428	468	459	240
429	470	460, para. 1	403, para. 1
430	471	2	2
431	472	3	3
432	473	4	4
433	474	*Ill.* (a)	*Ill.* (a)
434	475	(b)	(b)
435, para. 1	480	(c)	(c)
paras. 2 & 3	481	(d)	......
436, para. 1	482, para. 1	(e)	403, *Ill.* (d)
2	2	(f)	(e)
3	347	(g)	(f)
4	......	(h)	(g)
437	484	461, cl. 1	367, para. 2
438, para. 1	445	2	3
2	447, para. 1	462	366
439	221	463	367, paras 1
440	222	464, para. 1	367, paras. 1, 2 & 4
441	223		369
442	554	2[5]	371, para. 1
443	225	3	372
444	227	4	367, para. 5, *Proviso*
445	227	464, para. 5	......
446	226	6	537
447	228	7[6]	537
448	229	465	196

[1] and [2] See Act XI, 1874, s. 38.
[3] Ditto ditto, s. 39.
[4] See Act XI, 1874, s. 40.
[5] Ditto ditto, s. 41.
[6] See Act XI 1874, s. 41.

Old Code (Act X of 1872).	New Code (Act X of 1882).	Old Code (Act X of 1872).	New Code (Act X of 1882).
466, paras. 1, 2 & 3	197, para. 1	498, para. 1	107, 123
4	2	2	123
5[1]	4, last para	499, para. 1	......
467	195, para. 1, cl. (*a*)	2	.....
468	(*b*)	3	123, paras. 1 & 4
469	(*c*)	*Expln.*	.....
470, para. 1	195, para. 2	500	124, para 1, & 125
2	3	501	126
470, *Expln.*	......	502, para. 1	514, para. 1
471, paras. 1 & 2	476, para. 1	2	2
para. 3	2	3	3
472, para. 1	477, para. 1	4	4
2	......	5	1
3	477, para. 2	6	121
473	487, para. 1	7	107, 514
474, paras. 1 & 2	478	503, para. 1	514, para. 1
para. 3	.....	2	paras. 2 & 3
475	479	3[3]	para. 4
476	478, para. 2	504, para. 1	109
477	476	2	120, para. 1
478	199	3	.....
479	199	4	109
480	127	505	110
481	128	506	110
482	129	507, para. 1	123, para. 2
483	132, cl. (*a*)		3
484	130	508	123, para. 3
485	132, cl. (*c*)	509, para. 1	112
486	(*d*)	2	554
487	131, and 132, cl. (*b*)	510, para. 1	123, para. 1
488	132, cl. 1	2	5
480 to 488 (Ch		511	124, para. 1
XXXVI)[2]	127 to 132 (Ch. IX)	512	2
489, para. 1	{ 106, para. 1	513	126
	{ 123, paras. 1 to 3	514, para. 1	514, para. 1
2	120, para. 1	2	paras. 2 & 3
3		3	para. 4
4	......	515, para. 1	112, 114
490	{ 106, para. 1	2	109
	{ 123, paras. 1 to 3	3	117, para. 2
491	107	4	511
Explns.	107, 117	516	122
492	112	517	111
492, *Expln*	113	518, with *Expln.*	144, para. 1
493, para. 1, cl. 1	554	518, *Expln.* 2	2
2	106, para. 1, last cl.,	3	3
	& 118, *Proviso* 2nd	4	4
2	......	519	143
494	90	520	435, para. 3
Proviso	{ 108, para. 1	521	133
	{ 114, *Proviso*	522	134
495	116	523, para. 1	135
496	119	2	138, cl. (*a*)
497	{ 118, para. 1	3	139
	{ 123, para. 1	4	141

[1] See Act XI, 1874, s. 42. [2] See Act XI, 1874, s. 43. [3] See Act XI, 1874, s. 44.

Old Code (Act X of 1872).	New Code (Act X of 1882).	Old Code (Act X of 1872).	New Code (Act X of 1882).
523, para. 5 ...	138, cl. (*c*), and 139	530 ...	145
524, para. 1 ..	138, cl. (*b*)	531 ...	146
2 ...	......	532 ...	147
525, para. 1 ...	{ 136, & 137, para. 1	533 ...	148, para. 1
	{ 140, para. 2	534 ...	522
2 ...	140, para. 3	535 ...	1, para. 2
526, para. 1 ...	{ 139, para. 1	536 ...	488
	{ 140, para. 1	537 ...	489
2 ...	140, para. 2	538 ..	490
527[1] ..	137, para. 2	539 ...	558, para. 1
528 ...	142	540 ...	1, para. 2
529 ...	1, para. 2	541 ...	1, para. 2

Table showing correspondence of the section-numbers of Act XI of 1874 separately with those of the New Code (Act X of 1882).

Act XI of 1874.	New Code (Act X of 1882).	Act XI of 1874.	New Code (Act X of 1882).
1 ...	4, cls. (*q*) & (*r*), 28, 204, para. 1	23 ..	. ...
		24, cl. 1 ...	......
2 ...	4, para. 2, cl. 1	2 ...	415, *Expln.*
3 ...	380, para. 1	25 ...	548
4 ...	7, para. 1, cl. 2, para. 3	26 ..	Om: see secs. 421, 423
5 ...	14, para. 3	27 ..	422, cl. 2
6 ...	192, para. 1, 528, para. 1	28 ...	433
		29, cl. 1 ..	436, cl. 1
7 ...	......	2 ...	*Proviso* (*b*)
8 ...	495	30 ...	439
9 ...	178, *Proviso*	31 ...	437
10 ...	......	32 ...	383, 390
11 ...	527	33 ..	391, para. 2, 394
12 ...	447, para. 2, 448	34, cl. 1 ...	409, para. 1
13 ...	340	2 ...	4
14 ...	209	3 ...	......
15 ...	218, cl. 1	35 ...	504, para. 1, 505, 507
16 ...	254		
17 ...	260, cl. (*i*)	36 ...	165, para. 4
18 ...	193, para. 1	37 ...	514, para. 5
19 ...	286	38 ...	517, para. 1, & *Expln.*
20 ...	288	39 ...	465, para. 2
21 ...	306, para. 1, 307	40 ..	232, *Ill.*
22, cl. 1 ...	410	41 ...	371, para. 1, 548
2 ...	418, 423, cl. (*d*)	42 ...	4, last para.
3 ...	371, para. 3	43 ...	Chapter IX
4 ...	... ..	44 ...	514, para. 4
5 ...	378, 429	45 ...	137, para. 2

[1] See Act XI, 1874, s. 45.

Table shewing correspondence of the section-numbers of the High Courts Act (X of 1875) with those of the New Code (Act X of 1882).

Act X of 1875.		New Code (Act X of 1882).	Act X of 1875.		New Code (Act X of 1882).
1	..	......	54	...	278
2	...	2	55	...	279
3	...	4, 266	56	...	279
4	..	334	57	..	278
5	...	335	58	...	280
6	...	5	59	...	286
7	...	226	60	...	287
8	.	226	61	...	342
9	...	227	62	...	289, 290
10	...	227	63	...	292
11	...	228	64	...	293
12	...	229	65	..	296
13	...	210, 548	66	...	344
14	...	273, 403	67	...	295
15	...	231	68	...	365
16	..	230	69	..	294
17	...	233	70	...	543
18	..	234	71	..	509
19	...	235	72	...	510
20	...	236	73	...	.....
21	...	267	74	..	512
22	...	238	75	..	288
23	...	239	76	.	503, 504, 505, 507
24	...	225	77	...	338
25	..	532	78	...	339
26	...	220	79	..	......
27	..	336	80	..	540
28	..	271	81	...	90
29	..	271	82	...	87
30	...	272	83	...	89
31	...	340	84	..	90
32	...	267	85	...	291
33	...	274, 276	86	...	94
34	...	272	87	...	96
35	.	451	88	...	104
36	...	452	89	...	485
37	...	452	90	...	297
38	...	276	91	...	298
39	...	311	92	...	300
40	...	312	93	...	299
41	...	311	94	...	301
42	...	313	95	...	303
43	...	313	96	...	302
44	...	314	97	...	305
45	...	315	98	...	305
46	...	318	99	...	283
47	...	277, 278	100	...	308
48	...	279	101	...	434
49	...	276	102	...	240
50	...	316	103	...	384
51	...	317	104	...	384, 385
52	...	......	105	..	386, 387
53	...	277	106	...	545, 546

Act X of 1875	New Code (Act X of 1882).	Act X of 1875.	New Code (Act X of 1882).
107 ...	.....	131 ...	196
108 ...	392, 394, 395	132 ..	197
109 ...	35	133 ...	195
110 ...	396	134 ...	195
111 ...	397	135 ...	476
112 ..	399	136 ...	498
113 ...	368	137 ...	514
114 ...	382	138 ...	514, 516
115 ...	517	139 ...	513
116 ...	544	140 ...	106
117 ..	403	141 ...	106
118 ...	211	142 ...	522
119 ...	511	143 ...	1
120 ...	465	144 ...	......
121 ...	466	145 ...	194
122 ...	467	146 ...	333
123 ..	468	147 ...	526
124 ...	470	148 ...	491
125 ...	471	149 ...	539
126 ...	472	150 ...	352
127 ...	473	151 ...	345
128 ...	474	152 ..	25
129 ...	475	153 ..	558
130 ...	341		

Table shewing correspondence of the section-numbers of the Presidency Magistrates' Act (IV of 1877) with those of the New Code (Act X of 1882).

Act IV of 1877.	New Code (Act X of 1882).	Act IV of 1877.	New Code (Act X of 1882).
1 ...	......	23 ...	185
2 ...	......	24 ...	531
3 ...	1	25 ...	191
4 ...	......	26 ...	......
5 ...	342, 558	27 ..	204
6 ...	4	28 ...	191
7 .	. ...	29 ...	198
8 ...	7, 18, 19, 20, 25	30 ...	200
9 ...	18, 20, 21	31 ..	537
10 ..	3	32 ...	203
11 ...	32	33 ...	204
12 ..	33	34 ...	90, 204
13 ...	35	35 ...	204
14 ..	5	36 ...	90
15 ...	64	37 ...	205
16 ...	164	38 ...	196
17 ...	551	39 ...	197
18 ...	177	40 ...	195
19 ...	179	41 ...	195
20 ...	180	42 ...	195
21 ...	182	43 ...	195
22 ...	181	44 ...	476

Act IV of 1877.	New Code (Act X of 1882).	Act IV of 1877.	New Code (Act X of 1882).
45 ...	199	101 ...	228
46 ...	195, 196, 197	102 ...	229
47 ...	68	103 ...	231
48 ...	69	104 ...	230
49 ...	70	105 ...	233
50 ...	73	106 ...	234
51 ...	74	107 ...	235
52 ...	93	108 ...	236
53 ...	90	109 ...	237
54 ...	186	110 ...	238
55 ...	186	111 ...	239
56 ...	75, 77	112 ...	240
57 ...	......	113 ...	403
58 ...	76	114 ...	241, 370
59 ...	77	115 ...	362
60 ...	79	116 ...	254
61 ...	......	117 ...	246, 537
62 ...	65	118 ...	247, 259
63 ...	82	119 ...	242
64 ...	83, 84	120 ...	243, 255
65 ...	85, 86	121 ...	244, 256
66 ...	......	122 ...	254, 255
67 ...	87	123 ...	364
68 ...	88	124 ...	92, 344
69 ...	89	125 ...	248
70 ...	63, 496	126 ...	245, 258, 370
71 ...	497	127 ...	347
72 ...	499	128 ...	348
73 ...	500	129 ...	495
74 ...	496	130 ...	340
75 ...	501	131 ...	341
76 ...	502	132 ...	352
77 ...	514	133 ...	259, 345
78 ...	514	134 ...	540
79 ...	514	135 ...	90
80 ...	513	136 ...	90
81 ...	207	137 ...	87, 88
82 ...	208	138 ...	89
83 ..	208, 353	139 ...	542
84 ...	364	140 ...	91
85 ...	540	141 ...	485
86 ...	344	142 ...	244
87 ...	209	143 ...	252, 257
88 ...	210	144 ...	94
89 ...	210, 213, 220	145 ...	96
90 ...	210	146 ...	95
91 ...	211, 212, 213, 219, 291	147 ...	104
		148 ...	342
92 ...	216	149 ...	343
93 ...	217	150 ...	337
94 ...	221	151 ...	339
95 ...	222	152 ...	509
96 ...	223	153 ...	510
97 ...	554	154 ...	511
98 ...	225	155 ...	512
99 ..	227	156 ...	350
100 ..	227	157 ...	503

Act IV of 1877.	New Code (Act X of 1882).	Act IV of 1877.	New Code (Act X of 1882).
158	503	203	474
159	96	204	475
160	98	205	480
161	101	206	246, 482
162	102	207	484
163	102	208	106
164	102	209	106
165	103	210	120
166	52	211	.....
167	411, 412	212	109
168	417, 427	213	109
169	419	214	110
170	548	215	107
171	420	216	112, 113
172	421	217	90, 114
173	422	218	116
174	423	219	119
175	426	220	118
176	428	221	123
177	537	222	112
178	537	223	123
179	423	224	120
180	404	225	124
181	526	226	126
182	441	227	121
183	383, 390	228	514
184	384	229	514
185	326, 387, 388, 389, 538	230	511
186	535	231	107, 109, 110
187	391	232	111
188	392	233	522
189	394	234	488
190	393	235	489
191	395	236	490
192	396	237	558
193	397	238	184
194	464	239	184
195	469	240	432
196	466	241	433
197	467	242	250, 563
198	468	243	517
199	470	244	517, 523, 524
200	471	245	544
201	473	246	44
202	472	247	42

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OF IRREGULAR PROCEEDINGS.

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S 1, p. 2, end of note, *add* " The Island of Perim, having been occupied with a view to its permanent retention by officers of the Government of Bombay, became a part of British India within the definition of Stat. 21 and 22 Vic., cap. 106, and vested in Her Majesty along with the other Indian territories under that Act, which became law on 2nd September 1858.

The Indian Penal Code (XLV of 1860) and the Code of Criminal Procedure (X of 1882) extend in their entirety to the whole of British India, and, therefore, to the Island of Perim.—*Emp.* v. *Mangal Tekchand*, I. L. R., 10 Bom., 258."

S. 7, p. 11, end of note, *add* "The Island of Perim is now a Sessions Division.—*Emp.* v. *Mangal Tekchand*, I. L. R., 10 Bom., 274."

S. 35, p. 28, line 31, *after* " such offences," *add* " See *Reg.* v. *Abdool Azeez*, 7 W. R., Cr., 59 ; *Emp.* v. *Pir Mahomed*, I. L. R., 10 Bom., 254."

S. 66, p. 48, 8th line from bottom, *for* " Public-officer," *read* " Police-officer."

S. 75, p. 57, 19th line from bottom, *for* " p. 40," *read* " p. 49."

S. 107, line 20, *after* " may be," *insert* " have been."

S. 118, p. 88, 2nd line, *for* " 2 All., 935," *read* " 2 All., 835."

S. 133, p. 99, *after* second line, *add* " *Magistrates empowered.*—Where a Subdivisional Magistrate, on reports made by a second class Magistrate in his administrative capacity, made a conditional order against a person to abate a nuisance or appear before the second class Magistrate to show cause why the order should not be enforced, cause was shown as directed, and the order was made absolute. The second class Magistrate then issued a notice and order under s. 140, requiring the nuisance to be abated within a certain time. The High Court, on a reference, held that the order was not illegal, inasmuch as the 'Magistrate' indicated by s 137 was the Magistrate empowered and directed by the Magistrate having jurisdiction under s. 133 to take the evidence, and presumably the same Magistrate was referred to in s. 140. The Court, however, expressed an opinion that it was undesirable that Magistrates acting under s. 133 should call on the officer who reports on a nuisance in his administrative capacity to decide judicially whether it is a nuisance or not. —*In re Narasimha*, I. L. R., 9 Mad., 201."

S. 133, p. 101, *after* 7th para., *add* " The cases of *Basaruddin Bhinak* v. *Baha Rali*, I. L. R., 11 Cal., 8, and *Askar Mea* v. *Sabdar Mea*, I. L. R., 12 Cal., 137, were followed in *Lal Miah* v. *Nazir Khalashi*, I. L. R., 12 Cal., 696."

S. 137, p 104, end of note, *add* " The Magistrate indicated by this section, *i.e.*, the Magistrate empowered and directed to take the evidence, is the Magistrate who is to issue the notice under s. 140.—*In re Narasimha*, I. L. R., 9 Mad., 201. He may be a second class Magistrate to whom the matter is referred under s. 133.—*Ib.*"

S. 137, p. 104, line 16, *for* " 68 C. L. R., 431," *read* " 8 C. L. R., 431."

S. 140, p. 107, end of note, *add* " The Magistrate who is to issue the notice under this section is presumably the Magistrate indicated by the sections it refers to.—*In re Narasimha*, I. L. R., 9 Mad., 201. He may be a second class Magistrate before whom the person against whom the order is made is directed to appear, and has power to pass final orders under s. 140.—*Ib.*"

S. 145, p. 117, 3rd line from bottom. and p. 122, 43rd line, *after* " case of *Kali Kristo Thakur*," *add* " See *Goluck Chandra Pal* v. *Kali Charan De*, I. L R., 13 Cal., 175."

S. 145, p. 119, 29th line, *after* "case of *Nobokishore Chuckerbutty*," *add* "See *Goluck Chandra Pal* v. *Kali Charan De*, I. L. R., 13 Cal., 175."

S. 164, p. 142, *after* 39th line, *add* "In a recent case in Madras, PARKER, J., expressed an opinion that the provisions of s. 164 are imperative, and s. 533 will not render a confession admissible in evidence where no attempt has been made to conform to the provisions of the former section.—*Emp.* v. *Viran*, I. L. R., 9 Mad., 224. There the Deputy Magistrate of Malabar, purporting to act under the provisions of the Mapilla Act (Madras Act, XX of 1859), recorded a statement in the nature of a confession made by V, who was under arrest on suspicion of being concerned in a Mapilla outrage. This statement, which was made in Malayalam, was recorded in English in the form of a narrative, and was signed by the Magistrate only.

The same Magistrate shortly afterwards, purporting to act under the Code of Criminal Procedure, before any evidence was recorded against V, examined him as to this statement, which was read over and translated to him. In answer to questions, V admitted that he had made it voluntarily.

This examination was recorded according to the provisions of s. 364 of the Code of Criminal Procedure. After other evidence was recorded, V retracted his statement. He was committed to the Sessions, tried and convicted mainly on his own recorded statement and examination.

The Deputy Magistrate was examined as a witness, and stated that the statement recorded by him was made by V, and was correctly recorded and was made voluntarily.

It was held, that the record of the statement made by V to the Deputy Magistrate was not admissible in evidence against V.

PARKER, J., also was of opinion that if the confessional statement of V was recorded by the Magistrate in his executive capacity, it was not receivable in evidence under s. 80 of the Evidence Act, and further, that the action of the Magistrate in examining V as to his confessional statement before there was any legal evidence on the record against him was illegal, and, therefore, the record of such examination could not be used in evidence against V, and inasmuch as the record of the statement of V was not admissible, secondary evidence thereof could not be given."

S. 145, p. 117, line 18, *after* "dispute," *add* "It was also held in *Anund Moyi Dabia* v. *Shurnomoyi*, I. L. R., 13 Cal., 179, that a julkur is not 'tangible immoveable property.'"

S. 145, p. 116, line 37, *after* "the case of *Raja Run Bahadur* v. *Ranee Tilessuree Koer*," *add* "It seems now from the case of *Goluck Chandra Pal* v. *Kali Charan De*, I. L. R., 13 Cal., 175, that a reference by a Magistrate to a police report which sets out the probability of a breach of the peace is a sufficient statement of the reasons for the Magistrate being satisfied of the existence of a dispute likely to cause a breach of the peace within the meaning of this section."

S. 177, p. 158, end of note, *add* "See *Emp.* v. *Mangal Tekchand*, I. L. R., 10 Bom., 274."

S. 195, p. 177, line 33, *after* "the case of *Dukhoo Pein* v. *Chundro Kant Chowdhry*," *add* "A prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior.—*Emp.* v. *Jugul Kishore*, I. L. R., 8 All., 382, overruling *Emp.* v. *Radha Kishan*, I. L. R., 5 All., 36."

S. 198, p. 187, end of note, *add* "The brother of a lunatic is not as such 'a person aggrieved by such offence' within the meaning of this section for the purpose of a prosecution against the wife of the lunatic for bigamy, and his complaint, it was held, could not be entertained.—*Emp.* v. *Bai Rukshmoni*, I. L. R., 10 Bom., 340."

S. 200, p. 190, line 6, *for* "plaint," *read* "complaint."

S. 202, p. 192, end of note, *add* "A reference to a Police-officer under this section for inquiry and report cannot be made after evidence has been taken for the complainant and process issued.—*Sadagopacharyar* v. *Ragavacharyar*, I. L. R., 9 Mad., 282."

S. 235, p. 227, 19th line, *for* "4 Cal., 78," *read* "4 Cal., 18."

S. 245, p. 234, *after* para. 5, *add* "See *Emp.* v. *Tulla*, I. L. R., 7 All., 904."

S. 256, p. 246, end of note, *add* "But see note to s. 540, *post*."

S. 287, p. 268, *after* para. 5, *add* "See *Emp.* v. *Tulla*, I. L. R., 7 All., 904."

S. 289, p. 275, *after* para. 7, *add* "See *Emp.* v. *Tulla*, I. L. R., 7 All., 904."

S. 298, p. 284, *after* end of 1st para., *add* "So in the case of *Emp.* v. *Krishna Bhat*, I. L. R., 10 Bom., 319; it was laid down that it is an established rule of practice that an accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches."

S. 339, p. 304, line 30, *for* "5 Cal., 560," *read* "8 Cal., 560."

S. 342, p. 307, 7th line from bottom, *after* "Weir, p. 42," *add* "*Emp.* v *Viran*, I. L. R., 9 Mad., 224, pp. 228-9. Until there is evidence recorded against the accused, a Magistrate is not justified in putting any question at all to the accused, since it is only for the purpose of enabling an accused person to explain circumstances appearing in the evidence against him that a question can ever be put.—*Ib.*"

S. 346, p. 315, lines 36 & 39, *for* "I. L. R., 1 Cal., 434," *read* "1 C. L. R., 434."

S. 350, line 30, *after* "s. 537, *post*," *add* "Where a Magistrate on complaint made having issued process and examined witness in support of the complaint, was succeeded by another Magistrate, who on taking up the case referred the complaint to the police for inquiry and report, apparently under s. 202, and upon receipt of the report discharged the accused, the High Court held that the order of the latter Magistrate was illegal, and directed him to proceed according to law. A reference to the police under s. 202, it was said, could not be made after evidence had been taken and process issued.—*Sadagopacharyar* v. *Ragavacharyar*, I. L. R., 9 Mad., 282."

S. 364, p. 330, line 34, *after* "was upheld," *add* "In a recent case in Madras, PARKER, J., expressed an opinion that the provisions of s. 164 are imperative, and s. 533 will not render a confession admissible in evidence where no attempt has been made to conform to the provisions of the former section.—*Emp.* v. *Viran*. I L. R., 9 Mad., 224. There the Deputy Magistrate of Malabar, purporting to act under the provisions of the Mapilla Act (Madras Act, XX of 1859), recorded a statement in the nature of a confession made by V, who was under arrest of suspicion of being concerned in a Mapilla outrage. This statement, which was made in Malayalam, was recorded in English in the form of a narrative, and was signed by the Magistrate only.

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This examination was recorded according to the provisions of s. 364 of the Code of Criminal Procedure. After other evidence was recorded, V retracted his statement. He was committed to the Sessions, tried and convicted mainly on his own recorded statement and examination. The Deputy Magistrate was examined as a witness, and stated that the statement recorded by him was made by V, and was correctly recorded and was made voluntarily.

It was held, that the record of the statement made by V to the Deputy Magistrate was not admissible in evidence against V.

PARKER, J., was of opinion also that if the confessional statement of V was recorded by the Magistrate in his executive capacity, it was not receivable in evidence under s. 80 of the Evidence Act, and further, that the action of the Magistrate in examining V as to his confessional statement before there was any legal evidence on the record against him was illegal, and, therefore, the record of such examination could not be used in evidence against V, and that, inasmuch as the record of the statement of V was not admissible, secondary evidence thereof could not be given."

S. 360, p. 327, end of note, *add* "A Sessions Judge, after hearing a general statement made by a mooktear engaged in the case that the committing Magistrate was

not in the habit of reading over depositions to the witnesses, refused to receive certain depositions as evidence, and also refused to allow the Magistrate to be called as a witness. No objection was taken to the admission of the depositions by the Crown, and the accused were eventually convicted. The High Court held that the depositions ought to have been admitted and that the accused should have been allowed to call the Magistrate for examination, and the conviction was set aside.—*Adyan Sing* v. *Emp.*, I. L. R., 13 Cal., 121."

S. 367, p. 333, *after* 5th para, "The case of *Kamruddin Dai* v *Sonatun Mundul*, I. L. R., 11 Cal., 449, was followed under similar circumstances in the case of *Ram Das Maghi*, I. L. R., 13 Cal., 110

S. 384, p. 345, 3rd line, *for* "4 Cal.," *read* "11 Cal."

S. 417, p. 367, 7th line from bottom, *for* "held," *read* "trial."

S. 424, p. 375, end of note, *add* "The case of *Kameruddin Dai* v. *Sonatun Mundul*, I. L. R., 11 Cal., 449, was followed in the case of *Ram Das Maghi*, I. L. R., 13 Cal., 110."

S. 435, p. 384, line 70, *for* "7 Mad., 169," *read* "7 Mad., 189."

S. 436, p. 386, *after* 5th para., *add* "In cases exclusively triable by the Court of Session, this section empowers the Court of Session or District Magistrate to order a discharged person to be committed for trial by the Court of Session or District Magistrate. But there is nothing in the section to show that, when such order is made, the commitment thereupon must necessarily be made by the Magistrate who has discharged him, whilst the first proviso to it shows that it may be made by the Court of Session or by the District Magistrate according as the power under the section happens to be exercised by one or the other.—*Emp.* v. *Krishnabhat*, I. L. R., 10 Bom., 319. A Court of Session may try a prisoner so committed to itself.—*Ib.*"

S. 437, p. 38, 29th line, *for* "89 Mad., 436," *read* "8 Mad., 336."

S. 451, p. 450, 8th line, *for* "s. 8," *read* "s 7."

S. 456, p. 409, line 7th from bottom, *for* "1819," *read* "1879."

S. 494, p. 441, line 25th. *for* "7 All., 291," *read* "8 All., 291."

S. 520, p. 458, line 27, *for* "promissory," *read* "currency."

S 526, p. 462, 8th line from bottom, *for* "second," *read* "third."

S. 526, p. 462, *after* 5th line from bottom, *add* "The High Court cannot, it was considered by BIRDWOOD, J., under s. 526 any more than under s 25 of the Civil Procedure Code (Act XIV of 1882), direct the transfer of a case which is not properly before a subordinate Court of competent jurisdiction to receive and try it.—*Scott* v. *Ricketts*, I. L. R., 9 Mad., 356, following *Peary Lall Mozoomdar* v. *Komal Kishore Dassia*, I. L. R., 6 Cal., 30. The case of *Emp.* v. *Thakir*, I. L. R., 8 Bom., 312, was distinguished.

The District Magistrate and the Civil and Sessions Judge of the civil and military station of Bangalore are Magistrates subordinate to the High Court at Madras within the meaning of this section.—*Scott* v. *Ricketts*, I. L. R., 9 Mad., 356.

Under s. 5 of the 'Scheduled Districts Act, XIV of 1874,' the Local Government cannot, by extending an Act which is of necessarily restricted application, make its provisions applicable to an entirely new subject-matter, *viz.*, the litigation of a new local area.

Accordingly where the Government of Bombay issued the following Notification No. 823 of 1886:—'In exercise of the powers by s. 5 of the Scheduled Districts Act, XIV of 1874, the Governor of Bombay in Council is pleased, with the previous sanction of the President in Council, to extend to the Island of Perim the whole of Act II of 1864 of the Governor-General in Council, with the exception of ss. 2, 17 and 23. The Governor in Council is further pleased, in exercise of the powers conferred by s. 6 of the "Scheduled Districts Act, XIV of 1874," and by any other Enactment, to direct that the Resident at Aden shall be Sessions Judge and Court of Session for the Island of Perim, and shall exercise the same jurisdiction and powers in respect of the administration of civil

and criminal justice in the said island and in respect of the trial of persons committed for trial by the Court of Session for offences committed in the said island as are vested in him in Aden by the said Act.'

It was held that the provisions of the Aden Act, II of 1864, which (as appears from the preamble) deals with the litigation of Aden alone, could not be extended to Perim without enlarging the subject-matter of the Act, also that the appointment of the Political Resident at Aden as a Sessions Judge and Court of Session for the Island of Perim made under cl. (*a*) of s. 6 of the 'Scheduled Districts Act, XIV of 1874,' was valid and effectual with reference only to the provisions of the Criminal Procedure Code, and that that portion of the notification which regulates the exercise by the Resident of his powers with reference to Act II of 1864 should be treated as surplusage.—*Emp.* v. *Tekchand*, I. L. R., 10 Bom., 274.

A prisoner in that case, charged with having committed murder at Perim, was committed by the Magistrate there on the 26th August 1885 for trial before the Political Resident at Aden, by whom he was convicted and sentenced to death on the 14th September 1885. On the 25th January 1886. the High Court of Bombay reversed the conviction and sentence, on the ground that the Court of the Resident had no jurisdiction over the Island of Perim, and that the Resident not having been appointed a Judge of a Court of Session for that island, was not competent to try the prisoner. The High Court ordered a retrial before a competent Court. On the 10th February 1886, the Government of Bombay issued the Notification (No. 823) above set forth. On the 11th March 1886, an application was made to the High Court of Bombay for the transfer of the case to another Court of Session or to the High Court for trial.

The High Court held also that Perim is a Sessions Division, and that after the establishment under the Code of Criminal Procedure of a Court of Session for the Perim Sessions Division and the appointment of the Resident at Aden as Sessions Judge of that Court, the accused stood properly committed to a Court of Session. The High Court, therefore, could transfer the case from that Court under s. 526 of the Code to any other Court of equal or superior jurisdiction, or to the High Court of Bombay.

JARDINE, J., considered that, after the High Court had annulled the proceedings in the Court of the Resident at Aden as without jurisdiction, the case could not be treated as still pending in his Court; and as there was no Court of Session in existence at the time of the commitment, it necessarily followed that the case remained in the Magistrate's Court But whether the case was considered as pending in the Court of a Magistrate or of a Resident, or of a Sessions Judge, the High Court has the power to transfer it, and that under the circumstances the case should be transferred to the High Court for trial."

S. 529, p. 467, 4th line, *for* "Enpowered," *read* "Empowered."

S. 532, p. 470, 3rd line, *add* "See also *Emp.* v. *Mangal Tekchand*, I. L. R., 10 Bom., 274."

S. 537, p. 472, *after* line 37, *add* "As to what is a Court of competent jurisdiction, see *Emp.* v. *Krishna Bhat*, I. L. R., 10 Bom., 320."

S. 532, p. 470, end of note, *add* "Under s. 5 of the 'Scheduled Districts Act, XIV of 1874,' the Local Government cannot, by extending an Act which is of necessarily restricted application, make its provisions applicable to an entirely new subject-matter, *viz.*, the litigation of a new local area.

Accordingly where the Government of Bombay issued the following Notification No. 823 of 1886 :—'In exercise of the powers conferred by s. 5 of the "Scheduled Districts Act, XIV of 1874," the Governor of Bombay in Council is pleased, with the previous sanction of the President in Council, to extend to the Island of Perim the whole of Act II of 1864 of the Governor-General in Council, with the exception of ss. 2, 17. and 23. The Governor in Council is further pleased, in exercise of the powers conferred by s. 6 of the "Scheduled Districts Act, XIV of 1874," and by any other Enactment, to direct that the Resident at Aden shall be Sessions Judge and Court of Session for the Island of Perim, and shall exercise the same jurisdiction and powers in respect of the administration of civil and criminal justice in the said island, and in respect of the trial of persons committed for trial by the Court of Session for offences committed in the said island as are vested in him in Aden by the said Act.'

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the Island of Perim, made under cl. (*a*) of s. 6 of the 'Scheduled Districts Act, XIV of 1874,' was valid and effectual with reference only to the provisions of the Criminal Procedure Code, and that that portion of the notification which regulates the exercise by the Resident of his powers with reference to Act II of 1864 should be treated as surplusage.—*Emp.* v. *Tekchand*, I. L. R , 10 Bom., 274.

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S. 533, 4th line from bottom, *after* "duly made," *add* "In a recent case in Madras PARKER, J., expressed an opinion that the provisions of s. 164 are imperative, and s. 533 will not render a confession admissible in evidence where no attempt has been made to conform to the provisions of the former section.—*Emp.* v. *Viran*, I. L. R., 9 Mad., 224. There the Deputy Magistrate of Malabar, purporting to act under the provisions of the Mapilla Act (Madras Act XX of 1859), recorded a statement in the nature of a confession made by V, who was under arrest on suspicion of being concerned in a Mapilla outrage. This statement, which was made in Malayalam, was recorded in English in the form of a narrative, and was signed by the Magistrate only.

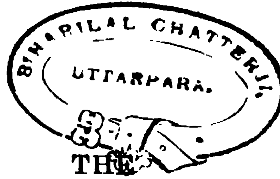
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THE

CODE OF CRIMINAL PROCEDURE,

BEING

ACT X OF 1882.

An Act to consolidate and amend the Law relating to Criminal Procedure.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to Criminal Procedure ; It is hereby enacted as follows :—

PART I.

PRELIMINARY.

CHAPTER I.

Short title. Commencement.

1. This Act may be called "The Code of Criminal Procedure, 1882 :" and shall come into force on the first day of January, 1883 ;

Local extent.

It extends to the whole of British India ; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law now in force, or shall apply to—

(*a*) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the police in the towns of Calcutta and Bombay ;

Act X of 1872, s. 540. The provisions of ss. 54, 55, 56 [see Act X of 1886, s. 3], 68, 84, 102 and 127 and of the 3rd column of Schedule No. II apply to the police in Calcutta and Bombay.

(*b*) any officer duly authorized to try petty offences in military bazars at cantonments and stations occupied by the troops of the Presidencies of Fort St. George and Bombay respectively ;

(c) heads of villages in the Presidency of Fort Saint George ; or

(d) village Police-officers in the Presidency of Bombay :

(e) and nothing in sections 174, 175 and 176 shall apply to the police in the town of Madras.

Compare ss. 1 and 2 of Act X of 1872.

Section 111 of the same Act saves powers vested in the police by any special or local law. See *Empress* v. *Gustadji Barjorji*, I. L. R., 10 Bom., 181.

Section 529 saves the provisions of s. 48 of Act XXIV of 1859 (*for the better regulation of the police within the territories subject to the Presidency of Fort St. George*), of s. 34 of Act V of 1861 (*for the regulation of police*), and of s. 16 of Act VIII of 1867 of the Governor of Bombay in Council (*for the regulation of the district police in the Presidency of Bombay*).

Section 535 saves the powers of Collectors and Revenue Courts. As to these, see Beng. Reg. VII of 1822, s. 34, and Act I of 1847.

Section 540 saves the jurisdiction of Presidency Police Magistrates ; and s. 541, the jurisdiction of landholders in Bombay, Heads of villages in Madras, village Police-officers in Bombay, and Cantonment Magistrates in Madras and Bombay.

Section 143 of the High Courts' Criminal Procedure Act (X of 1875) saved the provisions of the Prisoners' Testimony Act (XV of 1869) and the Prisoners' Act (V of 1871) ; and s. 3 of the Presidency Magistrates' Act (IV of 1877) provided that nothing in the Act should be deemed to restrict any power conferred by any special or local law.

Madras Act III of 1865, s. 1, provided, that every Magistrate within the Madras Presidency shall be authorized to take cognizance of any offence committed within his local jurisdiction against any special or local laws now in force in the said Presidency, notwithstanding any provision to the contrary in any Act or Regulation then existing ; and also of any offence against any special or local law which might thereafter be passed, unless such law should make the offence to which it referred punishable by some other authorities therein specially mentioned. Provided always, that every such Magistrate should be restrained, within the limits of his ordinary jurisdiction, as to the amount of punishment which he might inflict. This Act was repealed by Act XVI of 1874, which, in its turn, was repealed by Act XII of 1876. The rulings hereunder noted are not, however, affected by the repeal.

The repeal of Madras Act III of 1865 by Act XVI of 1874 did not deprive Magistrates in the Madras Presidency of jurisdiction to the extent of their ordinary powers over offences created by special or local laws. Section 1 of Act XVI of 1874 provided, that the repeal of former Acts should not affect any established jurisdiction notwithstanding that the same may have been in any manner derived from any enactment thereby repealed. The meaning of these words is, that the repeal of any Act shall leave any existing jurisdiction precisely as the repeal found it. The result is, that Acts are repealed, but all the effects which they have produced are to be treated as rooted in the law despite the repeal.—*Madras H. C. Pro.*, 29*th Sept.*, 1866 ; *Weir*, p. 40 ; and see *Madras H. C. Pro.*, 4*th and* 29*th June*, 1872 ; *Weir*, p. 41.

Again, the ordinary criminal law is not excluded by Reg. VII of 1817, or Act XX of 1863, s. 20, which provides, that "no suit or proceeding before any Civil Court under the preceding sections shall, in any way, affect or interfere with any proceeding in a Criminal Court for criminal breach of trust." The permission of the Board of Revenue, or of the Committees appointed under Act XX of 1863, is required only for the procedure prescribed in the special Acts, and cannot be taken out of the Act and applied as a restriction to the ordinary operation of the law. —*Madras H. C. Pro.*, 22*nd Feb.*, 1876 ; *Weir*, p. 41.

Heads of villages.—A Head of a village is a Magistrate within the meaning of the Criminal Procedure Code, and the confession of an accused person in the custody of the police, if made in his presence, is admissible in evidence.—*Madras H. C. Pro.*, 14*th Feb.*, 1868 ; *Weir*, p. 14 ; see s. 164, *infra*, as to confessions.

Special form of procedure.—For example, the provisions of "The Indian Articles of War," Act V of 1869.

Sections 174, 175 and 176 deal with certain inquiries by the Police.

Repeal of enactments.

2. On and from the first day of January, 1883, the enactments mentioned in the first schedule shall be repealed to the extent specified in the third column thereof, but not so as to restore any jurisdiction or form of procedure not then existing or followed, or to render unlawful the continuance of any confinement which is then lawful.

Notifications, &c., under repealed Acts.

All notifications published, proclamations issued, powers conferred, forms prescribed, local limits defined, sentences passed, and orders, rules and appointments made, under any enactment hereby repealed or under any enactment repealed by any such enactment, and which are in force immediately before the first day of January, 1883, shall be deemed to have been respectively published, issued, conferred, prescribed, defined, passed and made under the corresponding section of this Code.

Compare Act X of 1872, s. 2, para. 1, and Act X of 1875, s. 2, para. 1.

Restoring jurisdiction.—Compare Act X of 1872, ss. 82, 86; and see s. 491, *infra.*

Notifications.—Compare Act X of 1872, s. 2, last para.

Appointments.—Compare Act X of 1872, s. 10. A person appointed a Magistrate of the 2nd class under Act X of 1872, it has been held, is incompetent, since the present Code came in force, to pass a sentence of whipping, unless he is specially empowered to do so under s. 32, *infra,* although, under the repealed Act, the power to pass such a sentence was inherent in him.—*Empress* v. *Bagvanti Ravji,* I. L. R., 7 Bom., 303.

References to Code of Criminal Procedure and other repealed enactments.

3. In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act No. XXV of 1861, or Act No. X of 1872, or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section.

Expressions in former Acts.

In every enactment passed before this Code comes into force, the expressions "Officer exercising (or 'having') the powers (or 'the full powers') of a Magistrate," "Subordinate Magistrate, first class," and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class," and "Magistrate of the third class;" the expression "Magistrate of a Division of a District" shall be deemed to mean "Subdivisional Magistrate," the expression "Magistrate of the District" shall be deemed to mean "District Magistrate," and the expression "Magistrate of Police" shall be deemed to mean "Presidency Magistrate."

Ch. I s. 4 *References to Codes.*—The first paragraph of this section corresponds with the provisions of Act X of 1872, s. 2, para. 3.

Expressions in former Acts.—The expressions in the first part of the second paragraph are taken from Act X of 1872, s. 2, para. 4. The word 'Magistrate' includes all persons exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure—*Act I of* 1868, *s.* 2, *cl.* (13). The provisions as to 'Magistrate of a Division of a District' and 'Magistrate of a District' are new. The last clause of the paragraph is taken from Act IV of 1877, s. 10.

Interpretation-clause.

4. In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context :—

"Complaint":

(*a*) "Complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence ; but does not include the report of a Police-officer :

This is new. The definition excludes the report of a Police-officer and information given to a Police-officer.

Under s. 250 compensation cannot be awarded when, the complaint having been made to the Police, the Magistrate has taken cognizance of the case upon receiving a charge sheet against the accused sent in by the Police—*Empress* v. *Polavarapu*, I. L R., 7 Mad., 563; because there was no complaint as defined by this section. See *Ishri* v. *Bakhshi*, I. L. R., 6 All., 96.

"Investigation":

(*b*) "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by the police or by any person (other than a Magistrate or Police-officer) who is authorized by a Magistrate in this behalf :

Compare the definition in Act X of 1872, s. 4. The definition has been extended so as to include the proceedings of persons authorized by a Magistrate under s. 159 or 202, *infra*, to make local investigations.

"Inquiry":

(*c*) "Inquiry" includes every inquiry conducted under this Code by a Magistrate or Court :

Act X of 1872, s. 4.

"Judicial proceeding":

(*d*) "Judicial proceeding" means any proceeding in the course of which evidence is or may be legally taken :

This definition corresponds with the first part of the definition in Act X of 1872, s. 4, except that the word 'legally' has been added. This was in consequence of the decision of the Allahabad High Court in the case of *Queen* v. *Gholam Ismail*, I. L. R., 1 All., 1; see the judgment of Turner, Offg. C. J., p. 6. Compare s. 193 of the Penal Code (Act XLV of 1860). See *In re Troylokhanath Biswas*, I. L. R., 3 Calc., 742; and *Queen* v. *Soondur Putnaick*, 3 W. R., Cr., 59.

Proceedings of a Magistrate under s. 88, *post*, are not judicial proceedings.—*Empress* v. *Sheodihal Rai*, I. L. R., 6 All., 487.

"Writing" and "Written":

(*e*) "Writing" and "written" include "printing," "lithography," "photography," "engraving," and every other mode in which words or figures can be expressed on paper or on any substance :

Compare Act X of 1872, s. 4 and Act IV of 1877, s. 6.

"Subdivision":

(*f*) "Subdivision" means a subdivision made under this Code of a District :

This is new. By s. 8, *post*, all existing subdivisions which are now usually put under the charge of a Magistrate are to be deemed to have been made under this Code.

"Province":

(*g*) "Province" means the territories for the time being under the administration of any Local Government.

This is new. "Local Government" means the person authorized by law to administer executive government in the part of British India in which the Act containing such expression shall operate, and includes a Chief Commissioner.—*General Clauses Act, I of* 1868, *s.* 2, *cl.* 10.

"Presidency-town":

(*h*) "Presidency-town" means the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay :

"High Court":

(*i*) "High Court" means, in reference to proceedings against European British subjects or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras and Bombay, the High Courts of Judicature for the North-Western Provinces, the Chief Court of the Panjab and the Recorder of Rangoon :

In other cases "High Court" means the highest Court of criminal appeal or revision for any local area ;

or, where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in this behalf :

Act X of 1872, s. 4. See special definition, *infra*, s. 266. The Court of the Recorder of Rangoon was not included in the former Code, but power to try European British subjects was conferred on the Recorder by s. 55 of Act VII of 1872. Section 79 of the Burma Courts Act (XVII of 1875) provides : With reference to all trials held by the Judicial Commissioner or the Recorder of Rangoon, in the exercise of any original criminal jurisdiction (including jurisdiction transferred under s. 36 of the same Act) and to sentences passed on such trials, the special Court shall be deemed to be, for the purposes of appeal and otherwise, a High Court. Provided, that nothing in the former part of this section applies to sentences of death passed by the Recorder on European British subjects or on persons charged jointly with European British subjects. The definition of "High Court" in the second paragraph is taken from Act I of 1868, s. 2, cl. (11).

The last clause to this definition was added so as to enable the Governor-General in Council to appoint in outlying territories, where no such Court is established by law, an officer to perform its functions under the Code.

Ch. I s. 4

"Chief Justice": (j) "Chief Justice" includes also the senior Judge of a Chief Court:

See Act X of 1875, s. 3.

"Advocate-General": (k) "Advocate-General" includes also a Government Advocate, or, where there is no Advocate-General or Government Advocate, such officer as the Local Government may, from time to time, appoint in this behalf:

See Act X of 1875, s. 3, and Act X of 1877, s. 539, as amended by Act XII of 1879.

"Clerk of the Crown": (l) "Clerk of the Crown" includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown:

See Act X of 1875, s. 3.

"Public Prosecutor": (m) "Public Prosecutor" means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor; and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction:

This is new. Compare the provisions of ss. 57—60 of Act X of 1872 and the definition of 'prosecutor' in Act X of 1875, s. 3. A private complainant may instruct a pleader or a counsel, and the Public Prosecutor may avail himself of their services—s. 495, *post*. In doing so he does not deprive himself of the management of the case.—*In re Narayan M. Pendshe*, 11 Bom. H. C. R., 102.

A Public Prosecutor should be without a personal interest in the cases which he conducts. Accordingly, the appointment of the Magistrate, who in the first instance had tried and convicted the accused, to be Crown Prosecutor to conduct an inquiry subsequently directed in the same case, was, in *Reg.* v. *Kashinath Dinkar*, 8 Bom. H. C. R., Cr. Cas., 126, 153, censured as being unprecedented and objectionable.

Section 270 provides that, in every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor. As to the persons who may conduct prosecutions, see s. 495, *post*.

"Pleader": (n) "Pleader," used with reference to any proceeding in any Court, means a pleader authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized, and (2) any mukhtar or other person appointed with the permission of the Court to act in such proceeding:

This is new. The law now in force is the Legal Practitioners' Act (XVIII of 1879), amended by Act IX of 1884. Section 340, *post*, provides, that every person accused before a Criminal Court may, of right, be defended by a pleader.

"Police-station": (o) "Police-station" means any post declared, generally or specially, by the Local Government, to be a Police-station for the purposes of this

Code, and includes any local area specified by the Local Government in this behalf; and "Officer in charge of a Police-station" includes, when the officer in charge of the Police-station is absent therefrom or unable from illness to perform his duties, the Police-officer present at the Police-station who is next in rank to such officer and is above the rank of constable, or, when the Local Government so directs, any other Police-officer so present:

"Officer in charge of a Police-station":

The greater part of this definition is new. The provisions as to substitution are taken from Act X of 1872, s. 136. The powers of an officer in charge of a Police-station may be exercised by Police-officers superior in rank throughout the local area to which they are appointed. As to the powers of an officer in charge of a Police-station, see ss. *55, 56, 94, 127, 128, 153, 156, 157, post;* and as to his duties, see ss. *55, 62, 154, 169, 173, 174, 175, post.*

"Offence":

(*p*) "Offence" means any act or omission made punishable by any law for the time being in force:

This is new.

"Cognizable offence": "Cognizable case":

(*q*) "Cognizable offence" means an offence for, and "cognizable case" means a case in, which a Police-officer, within or without the Presidency-towns, may, in accordance with the second schedule, or under any law for the time being in force, arrest without warrant:

"Non-cognizable offence": "Non-cognizable case":

"Non-cognizable offence" means an offence for, and "non-cognizable case" means a case in, which a Police-officer, within or without the Presidency-towns, may not arrest without warrant:

As to the first part of the definition, see Act XI of 1874, s. 1. The latter part is taken from the definition in Act X of 1872, s. 4. The definition has been amended so as to connect it with the second schedule.

"Bailable offence"; "Non-bailable offence":

(*r*) "Bailable offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force; and 'non-bailable offence' means any other offence:

Act XI of 1874, s. 1.

"Warrant-case":

(*s*) "Warrant-case" means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months:

This is new.

Ch. I s. 4

"Summons-case": (t) "Summons-case" means a case relating to an offence not so punishable:

This is new.

"European British subject": (u) "European British subject" means—

(1) any subject of Her Majesty born, naturalized or domiciled in the United Kingdom of Great Britain and Ireland, or in any of the European, American or Australian Colonies or Possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal;

(2) any child or grandchild of any such person by legitimate descent:

This definition corresponds substantially with the definitions in Act X of 1872. s. 71, and Act X of 1875, s. 3.

In the case of *The Queen* v. *Meares*, 14 B. L. R., 106, a European British subject in the mofussil was convicted by a Magistrate under the provisions of s. 71 of Act X of 1872. He appealed, on the ground (*inter alia*) that the Magistrate had no jurisdiction to try the case, inasmuch as the Governor-General in Council had not the power, under 24 & 25 Vict., c. 67, to subject a European British subject to any jurisdiction other than that of the High Court; and that, therefore, the provisions of the Code under which the prisoner had been tried were *ultra vires* and illegal. It was held, that the jurisdiction of the High Court, as given by the Letters Patent, was subject to the legislative powers of the Governor-General in Council, and that the Magistrate had jurisdiction to try the case.

As to domicile, see Part II, ss. 5—19 of the Indian Succession Act, X of 1865.

The High Court at Calcutta was empowered by the Governor-General in Council to discharge all the functions of a High Court under the Code of Criminal Procedure, in all criminal proceedings against European British subjects, or persons jointly charged with European British subjects, in the Civil Commissionership of the Andaman and Nicobar Islands.—*Gazette of India*, 1878, p. 132.

The European Vagrancy Act (IX of 1874) provides (s. 30), that any European British subject who, upon the summary inquiry mentioned in section five, has been determined to be a vagrant, or who has been convicted under section twenty-two or twenty-three, shall, so long as he remains in India, be subject, beyond the limits of the Presidency-towns, to the provisions of the Code of Criminal Procedure (other than those contained in Chap. XXXVIII of the same Code) applicable to a European not being a British subject.

If from any cause he is committed or held to bail by the Justice of the Peace to take his trial before a High Court, he shall not be at liberty to object to the jurisdiction of such Justice of the Peace or High Court on the ground of anything contained in the former part of the section.

And, save as in the section provided, nothing shall be deemed to confer jurisdiction over European British subjects on Magistrates who, if the Act had not been passed, would have had no such jurisdiction.

As to the trial of European British subjects, see Chap. XXXIII.

"Chapter": "Schedule": (v) "Chapter" means a chapter of this Code; and "Schedule" means a schedule hereto annexed:

This is new.

"Place": (w) "Place" includes also a house, building, tent and vessel.

Words referring to acts.

Words which refer to acts done extend also to illegal omissions ; and

Words to have same meaning as in Penal Code.

all words and expressions used herein and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code.

The first clause is new. The second is taken from Act XI of 1874, s. 2; and the last partially from s. 42 of the same Act.

The wording of some of the definitions in Act X of 1872 has been amended by the present Code, and definitions of 'public prosecutor,' 'pleader,' 'offence,' 'chapter,' 'schedule,' 'place,' and 'police-station' have been added. Words such as 'special law,' 'local law,' defined in the Penal Code, will have the meanings attached to them respectively by that Code. The definitions of 'inquired into,' 'trial,' and 'Magistrate's case' have been omitted, as not needed in the Code in its revised form.

Trial of offences under Penal Code.

Trial of offences against other laws.

5. All offences under the Indian Penal Code shall be inquired into and tried according to the provisions hereinafter contained; and all offences under any other law shall be inquired into and tried according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offences.

This section is new. Under Act X of 1872 there were various sections relating to the trial of offences. Section 6 contained provisions as to inquiries by Magistrates; s. 7 defined the Courts empowered to try offences; s. 11 provided for inquiry and trial in the case of European British subjects; ss. 8 and 63, expl., provided for the trial of offences punishable under any local and special law.

Section 6 of Act X of 1875 made the provisions of that Act applicable to all criminal cases triable by the High Court; and s. 14 of Act IV of 1877 empowered the Presidency Magistrates to inquire into and try offences under enactments not specifying the Court authorized to try them.

The provisions of this section relating to the procedure under which "all offences under any other law" are punished do not include a contempt of the High Court committed by the publication of a libel out of Court when the Court is not sitting, although such contempt may include defamation—such a contempt being more than mere defamation and of a different character.—*Surendronath Banerjee* v. *Chief Justice of Bengal*, I. L. R., 10 Calc. (P. C.), 109.

The High Courts, in the Indian Presidencies, are superior Courts of Record. The offence of contempt and the powers of the High Courts to punish it are the same in such Courts as in the superior Courts in England. These powers, which formed a part of the Common Law, were conferred upon the Supreme Courts when they were established in the Presidency-towns. The jurisdiction of the High Courts to commit for contempt has not been affected by this Code.—*Ib.*

Section 549 gives power to the Governor-General in Council to make rules consistent with the Code and the Army Act, 1881, or any similar law for the time being in force, as to the cases in which persons subject to military law shall be tried by a Court to which this Code applies or by Court-Martial. See Beng. Reg. XX of 1825.

Ch. II ss. 6-7

PART II.

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES.

CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES.

A.—Classes of Criminal Courts.

Classes of Criminal Courts.

6. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely :—

I.—Courts of Session :

II.—Courts of Presidency Magistrates :

III.—Courts of Magistrates of the first class :

IV.—Courts of Magistrates of the second class :

V.—Courts of Magistrates of the third class.

Compare Act X of 1872, ss. 5—19. The Courts of the Presidency Magistrates are added. As to District Magistrates, see s. 10, *post.*

The word 'Magistrate' includes all persons exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure.—*Act I of* 1868, *s.* 2, *cl.* (13).

B.—Territorial Divisions.

Sessions Divisions:

7. Every province (excluding the Presidency-towns) shall be a Sessions Division, or shall consist of Sessions Divisions ;

Districts.

and every Sessions Division shall, for the purposes of this Code, be a District or consist of Districts.

Power to alter Divisions and Districts.

The Local Government may alter the limits, or, with the previous sanction of the Governor-General in Council, the number of such Divisions and Districts.

Existing Divisions and Districts maintained till altered.

The Sessions Divisions and Districts existing when this Code comes into force shall be Sessions Divisions and Districts respectively, unless and until they are so altered.

Presidency-towns to be deemed Districts.

Every Presidency - town shall, for the purposes of this Code, be deemed to be a District.

Clause 1. See Act X of 1872, s. 12.

Clause 2. See Act XI of 1874, s. 4.

Clause 3. See ss. 13 and 38 of Act X of 1872. The provision requiring the previous sanction of the Governor-General is taken from Act XI of 1874, s. 4.

'Local Government' means the person authorized by law to administer executive government in the part of British India in which the Act containing such expression shall operate, and includes a Chief Commissioner.—*Act I of* 1868, *s.* 2, *cl.* (10).

Clause 4. See Act X of 1872, s. 14, and Act XI of 1874, s. 4. Cachar was declared to be one of the Sessions Divisions of Assam.—*Assam Gazette*, 1874, p. 3.

Clause 5. The last clause of s. 8 of Act IV of 1877 provided, that the area within which the Presidency Magistrates might exercise jurisdiction should be deemed to be a District within the meaning of the Code of Criminal Procedure and the Act.

The District of Rangoon was, for the purposes of Act X of 1872, and for no other purpose, divided into the District of the Town of Rangoon and District of Rangoon; and the District of Amherst, for the same purpose, was divided into the District of the Town of Moulmein and District of Amherst.—*Gazette of India*, 1874, p. 62.

In the Regulation Districts of the Bombay Presidency, the local limits of the jurisdiction of a Magistrate of a District are co-extensive and co-terminous with the territorial limits of the collectorate, of which such District Magistrate is in charge as Collector.—*Bombay Gazette*, 1873, p. 279.

Power to divide Districts into Subdivisions.

8. The Local Government may divide any District outside the Presidency-towns into Subdivisions, or make any portion of any such District a Subdivision, and may alter the limits of any Subdivision.

Existing Subdivisions maintained.

All existing Subdivisions, which are now usually put under the charge of a Magistrate, shall be deemed to have been made under this Code.

This section gives the Local Government larger powers than the corresponding section (39) of Act X of 1872.

Under s. 3 of the Cantonments Act, III of 1880, a Cantonment Magistrate is to be deemed a Magistrate in charge of a Division of a District, *i.e.*, of a Subdivision; see s. 4 (*f*), *ante*.

C.—Courts and Offices outside the Presidency-towns.

Court of Session.

9. The Local Government shall establish a Court of Session for every Sessions Division, and appoint a Judge of such Court.

It may also appoint Additional Sessions Judges, Joint Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

This section incorporates so much of the provisions of ss. 15, 16, 17, and 18 of Act X of 1872 as relates to the establishment of Courts of Session and the appointment of Judges.

As to the sentences which may be passed by Sessions Judges, Additional or Joint Sessions Judges, and Assistant Sessions Judges, see s. 31, *infra*.

A Joint Sessions Judge cannot exercise the powers of a Sessions Judge under Chap. XXXII, *post*, which deals with Reference and Revision.—*In re Musa Asmal*, I. L. R., 9 Bom., 164.

Ch. II ss. 10-13

District Magistrate.

10. In every District outside the Presidency-towns, the Local Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate.

See Act X of 1872, s. 35. The words 'outside the Presidency-towns' are new, the Presidency-towns having been dealt with by Act IV of 1877. Clause 3 of s. 7, *ante*, p. 10, empowers the Local Government to alter Divisions and Districts.

Officers temporarily succeeding to vacancies in office of District Magistrate.

11. Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the District, such officer shall, pending the orders of the Local Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

Act X of 1872, s. *55*.

Subordinate Magistrates.

12. The Local Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be Magistrates of the first, second or third class in any District outside the Presidency-towns; and the Local Government, or the District Magistrate subject to the control of the Local Government, may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code.

Local limits of their jurisdiction.

Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such District.

So much of this section as relates to the appointment of Magistrates corresponds with the first clause of s. 37 of Act X of 1872. The rest of the section, with the exception of the last paragraph, gives similar powers to those conferred by s. 49 of Act X of 1872, excluding the proviso.

All Magistrates of Districts in the undermentioned Provinces were invested with powers under s. 49 of Act X of 1872:—

Bengal—*Gazette*, 1873, p. 6; Bombay—*Gazette*, 1873, p. 567; Madras—*Gazette*, 1873, p. 717; Panjab—*Gazette*, 1873, p. 75; N. W. P.—*Gazette*, 1873, p. 3; Burma—*Gazette*, 1873, Part II, p. 5; Oudh—*Gazette*, 1873, p. 2; Central Provinces—*Gazette*, 1873, Part IA, p. 18.

No order of a Local Government under this section can legally have retrospective effect.—*Macdonald* v. *Riddell*, 16 W. R., Cr., 79.

Power to put Magistrate in charge of Subdivision.

13. The Local Government may place any Magistrate of the first or second class in charge of a Subdivision, and relieve him of the charge as occasion requires.

Such Magistrates shall be called Subdivisional Magistrates.

Delegation of powers to District Magistrate.

The Local Government may delegate its powers under this section to the District Magistrate.

Compare s. 40 of Act X of 1872. That section empowered the Local Government to put a Magistrate in charge of a Division.

Section 3 of the Cantonments Act (III of 1880) provides, that "every person invested by the Local Government, under the Code of Criminal Procedure, with the powers of a Magistrate of the first class within the limits of any cantonment, shall be styled the 'Cantonment Magistrate,' and shall be deemed a Magistrate in charge of a Division of a District within the meaning and for the purposes of the said Code." A Division of a District is a Subdivision.—S. 4 (*f*), *ante*.

In Bengal, all Magistrates of Districts having Divisions have had the power delegated to them of placing any Magistrate of the first or second class in charge of the head-quarters division, whenever they may be absent from their head-quarters.—*Calcutta Gazette*, 1873, Part I, p. 236. Similar powers have been delegated by the Local Government in Madras (*Gazette*, 1873, p. 717); and the powers of Local Governments have been delegated to the Commissioner in Sind.—*Bombay Gazette*, 1873, p. 473.

As to additional powers conferrible on Subdivisional Magistrates, see *infra*, s. 37.

Special Magistrates.

14. The Local Government may confer upon any person all or any of the powers conferred or conferrible by or under this Code on a Magistrate of the first, second or third class, in respect to particular cases or to a particular class or particular classes of cases, or, in regard to cases generally, in any local area outside the Presidency-towns.

Such Magistrates shall be called 'Special Magistrates.'

With the previous sanction of the Governor-General in Council, the Local Government may delegate, with such limitations as it thinks fit, to any officer under its control the power conferred by the first paragraph of this section.

No powers shall be conferred under this section on any Police-officer below the grade of Assistant District Superintendent, and no powers shall be so conferred except, so far as may be necessary, for preserving the peace, preventing crime and detecting, apprehending and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force.

The first two clauses correspond with s. 42 of Act X of 1872, the third clause is taken from s. 5 of Act XI of 1875, and the last from Act V of 1861, s. 6.

The following powers were, under Act X of 1872, conferred upon District Superintendents and Assistant District Superintendents of Police in Bombay:

1. Power to endorse warrants or to order the removal of an accused person arrested under a warrant (ss. 168, 170). [ss. 83, 86.]
2. Power to issue and endorse a search-warrant, and order delivery of things ound (ss. 368, 372, 373, 376). [ss. 96, 99, 101.]
3. Power to hold an inquest (s. 135). [s. 176.]

Ch. II s. 15

4. Power to issue search-warrants otherwise than in the course of an inquiry (s. 377). [s. 98.]

5. Power to issue order to prevent obstruction (s. 518). [s. 144.]

6. Power to issue order prohibiting repetition of nuisance (s. 519). [s. 143.] —*Bombay Gazette*, 1873, p. 439.

By a notification, dated the 1st May 1877, under the provisions of ss. 42 and 223 of Act X of 1872, the Governor of Madras was pleased to confer upon all Subordinate Judges in the Presidency the powers of a Magistrate of the first class in respect to offences generally, together with the power to try summarily all the offences mentioned in s. 222 of that Act; and to invest all District Moonsiffs with the powers of a Magistrate of the first class in regard to offences generally.—*Madras Gazette*, 1877, p. 287.

Benches of Magistrates.

15. The Local Government may direct any two or more Magistrates in any place outside the Presidency-towns to sit together as a Bench, and may by order invest such Bench with any of the powers conferred or conferrible by or under this Code on a Magistrate of the first, second or third class, and direct it to exercise such powers in such cases, or such classes of cases only, and within such local limits, as the Local Government thinks fit.

Powers exercisable by Bench in absence of special direction.

Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members who is taking part in the proceedings as a member of the Bench belongs, and as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class.

The first paragraph of this section contains provisions similar to those of ss. 50 and 224 of Act X of 1872; the last paragraph corresponds with s. 51. Under s. 50 of Act X of 1872, it was decided that a Bench of Magistrates was competent only to hold *trials* for offences, and could not deal with miscellaneous matters, such as those coming under s. 530 of the Act.—*Sufferuddin* v. *Ibrahim*, I. L. R., 3 Calc., 754; (S. C.) 2 C. L. R., 263. That case turned upon the special wording of the section. The section empowered a Bench "to try such cases or classes of cases only and within such limits as the Government might direct." The Court having regard to the definition of the term "trial" considered that the section referred only to offences. Under the present section, however, there is nothing to prevent the Government from empowering Benches to deal with miscellaneous matters. In the absence of any special direction, Benches have, in fact, power under the latter paragraph to deal with such matters.

The following notification, dated the 6th May 1873, was published by the Government of Bengal, respecting Benches of Magistrates in the Districts of Dinagepore, Maldah, Rungpore, Chittagong, Tipperah, Dacca, Backergunge, Mymensing, Shahabad, Sarun, Tirhoot, and Kamroop:—

1. Under the direction of the Magistrate of the District, any two or more of the Honorary Magistrates in any district may, in that district, sit as a Bench in company with the Magistrate of the District, or the Subdivisional Magistrate, or any salaried Magistrate subordinate to the Magistrate of the District, exercising not less than second class powers; and any Bench so constituted is vested with first class powers in respect of offences cognizable by Magistrates of the first class, and with powers of summary trial under s. 222 [260] of the Criminal Procedure Code.

2. Under the special order of the Magistrate of the District, any two Magistrates, honorary or salaried, of whom one is vested with not less than second class

powers, may form a Bench with first class powers for the trial of any particular case or class of cases specially referred to them by the Magistrate of the District. Such Bench may also exercise summary powers under s. 222 [260], unless the order of reference is for trial in regular form.

3. Under the direction of the District Magistrate, any one of the Honorary Magistrates of a district may sit with any salaried subordinate Magistrate to form a Bench, and the Bench shall, when so constituted, exercise second class powers in respect of offences cognizable by Magistrates of that class and powers of summary trial under s. 225 [261] of the Criminal Procedure Code, unless any member of the Bench has first class powers, in which case the Bench may also exercise those powers. If the Magistrate of the first class has summary powers under s. 222 [260], the Bench may exercise those powers.

4. Subject to the general orders of the Magistrate of the District, any two or more Honorary Magistrates may, in their respective towns or municipalities, sit together as a Bench for the disposal of offences under Municipal or Town Acts, and the conservancy clause of any Police Act, without the assistance of any salaried Magistrate, and such Bench shall exercise third class powers and powers of summary trial under s. 225 in respect of all cases.—*Calcutta Gazette*, 1873, p. 662.

The Presidency Magistrates are directed, by the Lieutenant-Governor of Bengal, to submit returns, showing the working of their Courts, to be sent to the Commissioner of Police. See Resolution, 31st December, 1872, *Calcutta Gazette*, 1872, p. 29.

Under s. 50 of Act X of 1872, Benches of Magistrates in the towns of Ootacamund and Conoor in the Nilgiri District were invested with the powers of a Magistrate of the first class; and, under s. 224, the same Benches were empowered to try summarily all the offences mentioned in s. 222 [260] of Act X of 1872.—*Madras Gazette*, 1875, p. 1204.

An appeal lies under s. 407, *post*, from a conviction by a Bench of Magistrates invested with second or third class powers.—*Empress* v. *Narayanasami*, I. L. R., 9 Mad., 36. See note to s. 414, *post*.

Power to frame rules for guidance of Benches.

16. The Local Government may, or, subject to the control of the Local Government, the District Magistrate may, from time to time, make rules consistent with this Code for the guidance of Magistrates' Benches in any district respecting the following subjects :—

(*a*) the classes of cases to be tried ;

(*b*) the times and places of sitting ;

(*c*) the constitution of the Bench for conducting trials ;

(*d*) the mode of settling differences of opinion which may arise beween the Magistrates in session.

Compare Act X of 1872, ss. 52, 53. Under those sections the Magistrate of the District might make, vary, or annul rules subject to the orders of the Local Government. The present section, it will be noticed, only empowers the Local Government to make rules. See next section.

Subordination of Magistrates and Benches to District Magistrate;

17. All Magistrates appointed under sections 12, 13 and 14, and all Benches constituted under section 15, shall be subordinate to the District Magistrate, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Magistrates and Benches ; and

to Subdivisional Magistrate.

every Magistrate (other than a Subdivisional Magistrate) and every Bench exercising powers in a Subdivision shall be subordinate to the

Ch. II s. 18 Subdivisional Magistrate, subject, however, to the general control of the District Magistrate.

Subordination of Assistant Sessions Judges to Sessions Judge.

All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges.

Neither the District Magistrate, nor the Magistrates or Benches appointed or constituted under sections 12, 13, 14 and 15, shall be subordinate to the Sessions Judge, except to the extent and in the manner hereinafter expressly provided.

The first and last paragraphs of this section correspond with para. 2 of s. 37 of Act X of 1872. The second paragraph, with the exception of the words in brackets, corresponds with s. 41 of Act X of 1872. The third paragraph is new.

Under Act X of 1872, it was considered by the Madras High Court that, reading ss. 37, 40, 41, and 295 together, Magistrates were subordinate to the Sessions Court only for the purpose of reference to the High Court in cases in which revision is required.—*Proceedings*, 18*th Aug.*, 1873, 7 Mad. H. C. R., Appx., xxvii. It will be noticed, however, that the last paragraph of s. 295, which provided that, for the purposes of that section, every Magistrate in a Sessions Division should be deemed to be subordinate to the Sessions Judge of the Division, has been omitted from the present Code. In Madras, if a Magistrate be subordinate to the Head Assistant, the latter may call for explanation of his subordinate's proceedings; copies of such proceedings being required to be submitted to the appellate authority under Mad. H. C. Rule, dated 17th Nov., 1868. See *Proceedings*, 4*th Aug.*, 1873, 7 Mad. H. C. R., Appx., xxvi.

All Magistrates subordinate to the District Magistrate are inferior to him.—*Opendronath Ghose* v. *Dukhini Bewa*, I. L. R., 12 Calc., 473 (F. B.) See *Empress* v. *Laskari*, I. L. R., 7 All. (F. B.), 853; *In re Padmanabha*, I. L. R., 8 Mad. (F. B.), 18; *Empress* v. *Pirya Gopal*, I. L. R., 9 Bom., 100; *Shamsuddin Khan*, Punjab Record, 1885, p. 82.

A Joint Sessions Judge cannot exercise the powers of the Sessions Judge, under Chap. XXXII, *post* (of Reference and Revision). A Collector, as such, not being subject to the revisional jurisdiction of the High Court in criminal matters, that Court, in the exercise of such jurisdiction, it was held, was not competent to deal with an alleged illegal order made by the Collector under the Penal Code.—*In re Dianut Hosen*, 10 C. L. R., 14. In that case a Collector fined a Muktear under s. 182 of the Penal Code for making false statements when appearing in support of a petition.

See note to s. 435, *post*.

D.—Courts of Presidency Magistrates.

Appointment of Presidency Magistrates.

18. The Local Government shall, from time to time, appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the Presidency-towns, and shall appoint one of such persons to be Chief Magistrate for each such town.

Any two or more of such persons may (subject to the rules made by the Chief Magistrate under the power hereinafter conferred) sit together as a Bench.

Compare Act IV of 1877, ss. 8, 9.

Local limits of their jurisdiction.

19. Every Presidency Magistrate shall exercise jurisdiction in all places within the Presidency-town for which he is appointed and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port-dues.

Act IV 1877, s. 8, para. 5.

Bombay Court of Petty Sessions.

20. Every Presidency Magistrate in the Town of Bombay shall exercise all jurisdiction which, under any law in force immediately before the first day of April, 1877, was exercised in that town by the Court of Petty Sessions:

Provided that appeals under the law for the time being regulating the municipality of Bombay shall lie to the Chief Magistrate only.

Act IV of 1877, s. 8, last para., and s. 9, last para.

Chief Magistrate.

21. Every Chief Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any senior or Chief Magistrate, and may, from time to time, with the previous sanction of the Local Government, make rules consistent with this Code to regulate—

(*a*) the conduct and distribution of business and the practice in the Courts of the Magistrates of the town;

(*b*) the times and places at which Benches of Magistrates shall sit;

(*c*) the constitution of such Benches; and

(*d*) the mode of settling differences of opinion which may arise between Magistrates in session.

See Act IV of 1877, s. 9.

The following rules were issued in Bombay under s. 9 of the Presidency Magistrates' Act:—

1. *Hours of Business.*—The Magistrates will sit ordinarily from 11 A.M. to 5 P.M. The Summons office opens at 10 A.M. The holidays are the same as those entered in the Government list, subject to special arrangement to be made by the Magistrates in communication with the Chief Magistrate for the despatch of emergent business.

2. *Applications for process.*—Ordinary applications for process are to be made to the Magistrates on their first taking their seats on the Bench in the morning.

3. Professional gentlemen applying on behalf of their clients for the issue of any process are requested to furnish the summons clerk with a draft of the charge they wish to be entered on the process. In important cases much time will be saved, if the complainant be provided with a written information, setting forth the grounds on which the application may be based.

Ch. II s. 22 4. *Order of hearing charges.*—Cases will be taken, as far as practicable, in the following order:

1st.—Night charges, and prisoners in custody.

2nd.—Summons and warrant cases, subject to any cases being specially appointed for a particular hour.

5. *Court business to be transacted in person.*—All business with the Magistrates should generally be transacted in person, or by counsel, attorney, or pleader. The Magistrates cannot undertake to reply to written communications.

6. The chief clerk of the Court and the clerk to each Magistrate will be at all times ready to furnish information as to the course of business.

7. *Copies of records.*—Copies of records in the Presidency Magistrate's Court will be granted to persons authorized to receive the same upon payment of the copying and examining fee calculated at the rate of five annas per folio of 90 words or fraction of 90 words; provided that the minimum for any copy or extract will be five annas.

Prisoners will be granted, as a matter of right, copies of records, at the rate of two annas per folio of 90 words or fraction of 90 words.

8. Written applications for copies of records may be presented on any Court-day to the chief clerk between the hours of 11 A.M. and 3 P.M.

9. All applications for copies will be registered and attended to strictly according to the order of their presentation.

10. If the chief clerk sees no objection to granting the copy, he will initial and date the application, and cause the copy to be made. If he sees reason to object to the application, he will take the orders of the Magistrate.

11. No suitor or pleader will be allowed to make copies of records either personally or by his agent or clerk.

12. No copy will be delivered to the party applying for it until the regulated charge has been paid.

13. The correctness of the copies shall be certified by the Magistrate, if required. All corrections made in a copy should be verified.

14. *Magistrates.*—In the Fort Courts, the Chief Magistrate will, on Wednesdays and Fridays, hear summons cases, and the Junior Magistrate will hear them on Tuesdays and Thursdays. The Magistrate of the Girgaon Court will hear such cases daily.

15. It shall be the duty of each Junior Magistrate to inform the Chief Magistrate of any stress of business in his Court, and thereupon the Chief Magistrate shall provide for such distribution or transfer of cases amongst the three Magistrates as will make it impossible for the disposal of any one case to be unduly delayed by stress of work in a particular case.

16. Each Magistrate shall keep in prescribed form a return of all warrant and complaint cases which have been adjourned more than thrice, showing in each case the alleged facts of the charge; the way in which the first appearance of the accused is obtained,—*i.e.*, by summons or warrant; the way in which the subsequent appearance of the accused was secured,—*i.e.*, by custody or bail, and in case of inability to give bail, the amount of bail demanded; the adjournments of the case; the reason for such adjournments, and the final order for its disposal.

17. The Junior Magistrate shall submit such returns to the Chief Magistrate every week.

18. The Chief Magistrate shall, whenever he thinks proper, send for the record of any case decided by either of the Junior Magistrates.—*Bombay Gazette*, 1881, p. 9.

Somewhat similar rules are in force in the Court of the Presidency Magistrates at Calcutta.

E.—Justices of the Peace.

Justices of the Peace for the mufussal.

22. The Governor-General in Council, so far as regards the whole or any part of British India outside the Presidency-towns,

and every Local Government, so far as regards the territories subject to its administration (other than the towns aforesaid),

may, by notification in the official Gazette, appoint such European British subjects as he or it thinks fit to be Justices of the Peace within and for the territories mentioned in such notification.

This section is taken from Act II of 1869, s. 3.

Justices of the Peace for the Presidency-towns.

23. The Governor-General in Council or the Local Government, so far as regards the town of Calcutta,

and the Local Government, so far as regards the towns of Madras and Bombay,

may, by notification in the official Gazette, appoint to be Justices of the Peace within the limits of the town mentioned in such notification any persons resident within British India and not being the subjects of any foreign State whom such Governor-General in Council or Local Government (as the case may be) thinks fit.

See Act II of 1869, s. 4.

Present Justices of the Peace.

24. Every person now acting as a Justice of the Peace within and for any part of British India other than the said towns, under any commission issued by a High Court, shall be deemed to have been appointed under section 22 by the Governor-General in Council to act as a Justice of the Peace for the whole of British India other than the said towns.

Every person now acting as a Justice of the Peace within the limits of any of the said towns under any such commission shall be deemed to have been appointed under section 23 by the Local Government.

See Act II of 1869, s. 10.

Ex-officio Justices of the Peace.

25. In virtue of their respective offices, the Governor-General, the Ordinary Members of the Council of the Governor-General, the Judges of the High Courts and the Recorder of Rangoon are Justices of the Peace within and for the whole of British India ["Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the Local Government under which they are serving,"—Act III of 1884, sec. 1], and the Presidency

Ch. III ss. 26-29

Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

See 13 Geo. III, c. 63, s. 38; Act X of 1875, s. 152; Act IV of 1877, s. 8.

F.—Suspension and Removal.

Suspension and removal of Judges and Magistrates.

26. All Judges of Criminal Courts other than the High Courts established by Royal Charter, and all Magistrates, may be suspended or removed from office by the Local Government:

Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor-General in Council only shall not be suspended or removed from office by any other authority.

Compare s. 9 of Act X of 1872.

The word 'removed' is a technical term implying dismissal from the Bench, and does not include such administrative measures as removals or transfers of officers from one place to another.—*Madras Notification, 10th August* 1874; *Weir,* p. 82.

Suspension and removal of Justices of the Peace.

27. The Governor-General in Council may suspend or remove from office any Justice of the Peace appointed by him, and the Local Government may suspend or remove from office any Justice of the Peace appointed by it.

Act II of 1869, s. 9.

CHAPTER III.

POWERS OF COURTS.

A.—Description of Offences cognizable by each Court.

Offences under Penal Code.

28. Subject to the other provisions of this Code, any offence under the Indian Penal Code may be tried by the High Court or Court of Session or by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

Compare Act XI of 1874, s. 1, and Act IV of 1877, s. 4.

As to other provisions of this Code, see ss. 193, 194, &c., *infra.*

Offences under other laws.

29. Any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

When no Court is so mentioned, it may be tried by the High Court or by any Court constituted under this Code: Provided that—

(*a*) no Magistrate of the first class shall try any such

offence which is punishable with imprisonment for a term which may exceed seven years ;

(*b*) no Magistrate of the second class shall try any such offence which is punishable with imprisonment for a term which may extend to three years ; and

(*c*) no Magistrate of the third class shall try any such offence which is punishable with imprisonment for a term which may extend to one year.

Compare s. 8, para. 1, of Act X of 1872. The clause forbidding Magistrates of the first class to try offences under special or local laws, which are punishable with imprisonment for a term which may exceed seven years, is new. Such grave offences should be tried by a higher Court.

As to whether the offences here mentioned are bailable or not, or whether the offenders may be arrested without warrant or not, see Schedule II, "Offences against other Laws."

See, as to the effect of s. 8 of Act X of 1872 with regard to jurisdiction, *Empress* v. *Achi*, I. L. R., 2 Mad., 161.

Under s. 184, *post*, offences against Railway, Telegraph, Post Office, Arms and Ammunition Acts are made triable in Presidency-towns whether the offence is stated to have been committed there or not.

No Magistrate other than a Presidency Magistrate, and a Magistrate whose powers are not less than those of a Magistrate of the second class, shall try any offence under the Indian Railway Act (IV of 1879), s. 50.

Offences punishable under the Indian Registration Act, III of 1877 (amended by Act XII of 1879, s. 106), are triable by any Court or officer exercising powers not less than those of a Magistrate of the second class—S. 83. See *Empress* v. *Krishna*, I. L. R., 7 Mad., 347.

Under Act X of 1872 it was held, that s. 8, cl. 2, ousted the jurisdiction of a second class Magistrate to try an offence punishable under s. 80 of the Registration Act (VIII of 1861).—*Mad. H. C. Pro.*, *20th March*, 1876.

Offences not punishable with death.

30. In the territories respectively administered by the Lieutenant-Governor of the Punjab and the Chief Commissioners of Oudh, the Central Provinces, British Burma, Coorg and Assam, and in those parts of the other Provinces in which there are Deputy Commissioners or Assistant Commissioners, the Local Government may, notwithstanding anything contained in section 29, invest the District Magistrate with power to try as a Magistrate all offences not punishable with death.

This section corresponds with the first part of s. 36 of Act X of 1872. The provisions of that section as to sentences are incorporated in s. 34, *post*; and those as to confirmation, &c., of sentence, in s. 380, para. 1.

An officer invested with powers under this section is competent to pass a sentence of transportation for seven years instead of awarding a sentence of imprisonment.—*In re Boodhooa*, 9 W. R. (F. B.), Cr., 6.

The powers under this section are vested in the Deputy Commissioners of the following districts, *viz.* :—Darjeeling, Julpigori, Cachar, Sonthal Pergunnahs, Hazareebagh, Lohardugga, Singbhoom, Maunbhoom, Goalpara, Kamroop, Durrung, Nowgong, Seebsaugur and Luckimpore.—*Calcutta Gazette*, 1873, p. 67.

All Deputy Commissioners in the Districts of the Jhansie Division were invested with power to try as a Magistrate all offences not punishable with death, and to pass sentence of imprisonment for a term not exceeding seven years, including such solitary confinement as is authorized by law, or of fine, or of

Ch. III s. 31 whipping, or any combination of those punishments authorized by law.—*N. W. P. Gazette*, 1873, p. 3. As to Oudh, see *Oudh Gazette*, 1873, p. 1.

Appeal.—See s. 408, *post.* It has been held that "District Magistrate," in that section, includes a District Magistrate empowered under this section.—*Rongai* v. *Empress*, I. L. R., 9 Calc., 513, 516; (S. C.) 12 C. L. R, 500.

In the case of *Empress* v. *Paramanund*, 13 C. L. R., 375; (S. C.) I. L. R., 10 Calc., 85, where a Deputy Commissioner, specially empowered under this section, proceeded to try a charge, under s. 304 of the Indian Penal Code, of culpable homicide not amounting to murder, there being some evidence which would, if believed, have supported a charge of murder, but which the Court did not consider sufficiently strong to warrant such a charge, the Sessions Judge, to whom the sentence was submitted for confirmation, referred the matter to the High Court to have the sentence set aside, and the Deputy Commissioner directed to commit the case to the Sessions. The High Court held that, having regard to the provisions of s. 209, *post*, which empowers a Magistrate holding an inquiry to try the case himself if he thinks that only an offence within his jurisdiction has been committed, it was not possible to say that the Court had acted without jurisdiction, merely because there was some evidence which, if believed, would substantiate a charge of murder. Where there is such evidence, however, an officer empowered under this section incurs a grave responsibility if he tries the case himself. See notes to s. 294, *post*.

A District Magistrate empowered under this section, in trying a case which but for his special powers he would be bound to commit to the Court of Sessions, should be guided by the procedure laid down in Chap. XXI, *post*.

B.—Sentences which may be passed by Courts of various classes.

Sentences which High Courts and Sessions Judges may pass.

31. A High Court may pass any sentence authorized by law.

A Sessions Judge, Additional Sessions Judge or Joint Sessions Judge may pass any sentence authorized by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years; but any sentence of imprisonment for a term exceeding *four* [Act X of 1886, s. 1] years *and any sentence of transportation* [Act X of 1886, s. 1] passed by an Assistant Sessions Judge shall be subject to confirmation by the Sessions Judge.

The second paragraph of this section is taken from s. 15, para. 1, and s. 17 of Act X of 1872. A similar provision as to confirmation of a sentence of death was contained in s. 196 of the same Act. As to the last clause, see s. 18 of Act X of 1872.

A Joint Sessions Judge cannot, it has been held in Bombay, exercise the powers of a Sessions Judge under Chap. XXXII, *post*, which deals with Reference and Revision.—*In re Musa Asmal*, I. L. R., 9 Bom., 164.

As to appeals from Assistant Sessions Judges and from Courts of Session, see ss. 408, 410, *infra*, and *Rongai* v. *Empress*, I. L. R., 9 Calc., 513; (S. C.) 12 C. L. R., 500.

Sentences which Magistrates may pass.

32. The Courts of Magistrates may pass the following sentences, namely :— Ch. III s. 32

(*a*) Courts of Presidency Magistrates and of Magistrates of the first class :	Imprisonment for a term not exceeding two years, including such solitary confinement as is authorized by law ; Fine not exceeding one thousand rupees ; Whipping.
(*b*) Courts of Magistrates of the second class :	Imprisonment for a term not exceeding six months, including such solitary confinement as is authorized by law; Fine not exceeding two hundred rupees; Whipping.
(*c*) Courts of Magistrates of the third class.	Imprisonment for a term not exceeding one month; Fine not exceeding fifty rupees.

The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass.

No Court of any Magistrate of the second class shall pass a sentence of whipping unless he is specially empowered in this behalf by the Local Government.

See s. 20 of Act X of 1872.
(*a*) Act IV of 1877, s. 11.
(*b*) Act X of 1872, s. 20.
(*c*) Act X of 1872, s. 20.

'Imprisonment' means imprisonment of either description as defined in the Indian Penal Code, Act XLV of 1860, s. 2, cl. 18. It is of two kinds: rigorous, that is to say, with hard labour ; and simple. See s. 53 of the Penal Code.

As to the execution of the punishment of whipping, see ss. 390—396, *post*, and the Whipping Act, VI of 1864.

A person appointed a Magistrate of the second class under Act X of 1872 is incompetent, notwithstanding s. 2 of this Act, to pass a sentence of whipping unless he has been specially empowered to do so under s. 32.—*Empress* v. *Bhagvanti Ravji*, I. L. R., 7 Bom., 303.

Solitary confinement.—The Penal Code contains the following provisions :

Section 73.—Whenever any person is convicted of an offence for which, under this Code, the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say—

A time not exceeding one month, if the term of imprisonment shall not exceed six months ;

A time not exceeding two months, if the term of imprisonment shall exceed six months, and be less than a year ;

Ch. III s. 33

A time not exceeding three months, if the term of the imprisonment shall exceed one year.

Section 74.—In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such period.

In cases of simple imprisonment ordered as a process for enforcing the payment of a fine, the general rules of ss. 32 and 33 are applicable. The principle of s. 67 of the Penal Code, as amended by Act VIII of 1882, is unaffected by Chap. XXII, *post*, of this Code. See *Empress* v. *Ashgar Ali*, I. L. R., 6 All., 61.

It is not illegal, it has been held, to impose solitary confinement in summary trials under Chap. XXII. Section 262, *post*, only limits the imprisonment to a term of three months. It does not interfere with a Court's powers under s. 73 of the Penal Code to order solitary confinement, or with the similar powers given by s. 32 (*a*) of this Code.—*Empress* v. *Annu Khan*, I. L. R., 6 All., 83.

Power of Magistrates to sentence to imprisonment in default of fine.

33. The Court of any Magistrate may award such term of imprisonment in default of payment of fine as is authorized by law in case of such default: Provided that the term is not in excess of the Magistrate's powers under this Code:

Proviso as to certain cases.

Provided also that in no case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence shall the period of imprisonment awarded in default of payment of the fine exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32.

As to the first paragraph of this section, see Act X of 1872, s. 20, expl., and s. 309, para. 2.

The second paragraph corresponds with the first proviso to s. 309. See also the proviso to s. 12 of Act IV of 1877.

Section 64 of the Indian Penal Code, as amended by Act VIII of 1882, s. 2, provides, that in every case of an offence punishable with imprisonment as well as fine in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct, by the sentence, that, in default of fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of sentence; and section 65 of the same Code provides, that the term for which the Court directs the offender to be imprisoned shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. If the offence be punishable with fine only (the imprisonment which the Court imposes in default of payment of the fine shall be simple under Act VIII of 1882, s. 3), the term for which the Court directs the offender to be imprisoned, in default of

payment of fine, shall not exceed the following scale,—that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.—S. 67. Ch. III s. 33

Then by the General Clauses Act, I of 1868, s. 5, it is enacted that the provisions of ss. 63 to 70, both inclusive, of the Indian Penal Code shall apply to all fines imposed under the authority of any Act thereafter to be passed, unless such shall contain an express provision to the contrary. That proviso is reproduced in s. 1 of Act VIII of 1882. Accordingly, when an offence is punishable with imprisonment as well as fine, the imprisonment which can be awarded in default of payment of fine where there is a substantive sentence of imprisonment is, unless the Act creating the offence contains an express provision to the contrary, limited by s. 65 of the Indian Penal Code to one-fourth the maximum fixed for the offence, and further by s. 32 of this Code to one-fourth the period of imprisonment which the Magistrate is competent to inflict as a substantive sentence. But where the offence is punishable with fine only, a scale varying with the amount of fine which can be imposed is fixed by s. 67 of the Indian Penal Code. The imprisonment under that section must now be simple—Act VIII of 1882, s. 3. See *Empress* v. *Darba*, I. L. R., 1 All. (F. B.), 461.

Where, however, the offence is punishable with both fine and imprisonment, and the sentence is one of fine only, the imprisonment in default of such fine is limited by ss. 64 and 65 of the Indian Penal Code and the powers of the Magistrate under this section.

"It may be admitted," it was said, "that in some few instances these sections (64, 65, and 67 of the Penal Code as originally enacted) work an anomaly in that when fine alone is imposed as the punishment for an offence punishable with fine or imprisonment, or both, the term of imprisonment to which an offender may be sentenced in default of payment of the fine is less than could be awarded in default of payment of a fine of equal amount imposed for an offence punishable with fine only. Thus, if for affray, an offence punishable with imprisonment or fine, or both, an offender be sentenced, under s. 160 of the Indian Penal Code, to a fine of Rs. 50, the imprisonment which can be awarded in default is limited to one-fourth of a month, while if an owner of land be convicted under s. 154 of the Indian Penal Code for omitting to give information of a riot, an offence punishable with fine only, and be sentenced to pay a fine of Rs. 50 only, he can be sentenced, in default of payment, to imprisonment for two months" (but now, as already stated, such imprisonment can only be simple—Act VIII of 1882, s. 3)—*per* Full Bench.—*Empress* v. *Darba*, I. L. R., 1 All., 461.

Transportation cannot be imposed in default of payment of fine.—*Kanhussa* v. *Queen*, I. L. R., 5 Mad., 28.

As to the last clause, compare s. 20 of Act X of 1872, expl.

Where prisoners were convicted of having committed an offence punishable under s. 160 of the Indian Penal Code, and were sentenced to pay a fine of Rs. 25 each, or in default to be rigorously imprisoned for thirty days, the full term of imprisonment under the section,—it was held that, having regard to the provisions of s. 309 of Act X of 1872, the sentence was legal. The final clause, however, of that section—which was as follows: "Where a person is sentenced to fine only, the Magistrate may award such term of imprisonment in default of payment of fine as is allowed by law, provided the amount does not exceed the Magistrate's powers under this Act"—has been omitted from the present Code. The Court said—"It appears to the High Court, that the proper construction of this clause (the final clause of s. 309) is as follows: If imprisonment and fine, and further imprisonment in default of payment of fine is the sentence, the imprisonment in default cannot exceed one-fourth of the period of imprisonment which the Magistrate is competent to inflict for the offence; but if the sentence is *fine only*, the imprisonment in default of payment may be the whole period of imprisonment which the Magistrate is competent to inflict for the offence."—*Reg.* v. *Muhammad Saib*, I. L. R., 1 Mad., 277. See *Weir*, p. 16. That case has, however, been, though not expressly, overruled by *Empress* v. *Darba*, I. L. R., 1 All. (F. B.), 461. See *Karm Chand* v. *Empress*, Punjab Rec., 1885, p. 78.

Ch. III s. 33 Where the accused were sentenced by a Presidency Magistrate, under ss. 58 and 74 of the Bengal Excise Act, to a fine of Rs. 200 each, in default to three months' imprisonment, and in addition to six months' imprisonment, which was the maximum term that could be awarded under s. 74,—it was held, that the sentence of imprisonment was not in excess of the powers given to the Magistrate by s. 12 of Act IV of 1877, the imposition of the additional sentence of imprisonment not affecting the Magistrate's power as regarded the original sentence under s. 58.—*Ram Chunder Shaw* v. *Empress*, I. L. R., 6 Calc., 575; (S. C.) 8 C. L. R., 250.

The following rules as to the discharge of prisoners confined in default of payment of a fine, on payment of such fine, are in force in the N.-W. Provinces:—

(1) In all cases in which any offender is sentenced to imprisonment in default of fine, he may pay or cause to be paid to the jailor of the jail in which he shall be so imprisoned the sum mentioned in the warrant of commitment, or any portion thereof, and the jailor shall receive the same, and thereupon discharge such person, or make a deduction from the term of imprisonment proportioned to the amount paid, as the case may be.

(2) The jailor shall certify to the Court from which the warrant issued all payments of fines, and shall remit to the Court all sums received in payment of fines, and on full execution of the sentence he shall return the warrant to the Court as directed by law.—*N.-W. P. Gazette*, 1878, p. 570.

Where a prisoner was sentenced to imprisonment and fine, and in default of payment of the latter to a further term of imprisonment, and paid a portion of the fine, but, that fact not having been communciated to the jailor, underwent the entire further term of imprisonment,—it was held that, under these circumstances, the Court had no power to order the fine to be refunded.—*Reg.* v. *Natha Mula*, 4 Bom. H. C. R, Cr. Cas., 37.

Sections 69 and 70 of the Penal Code provide:—If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration.

A is sentenced to a fine of one hundred rupees, and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.—S. 69.

The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.—S. 70.

In cases of simple imprisonment ordered as a process for enforcing the payment of a fine, the general rules of ss. 32 and 33 are applicable, and the principle of s. 67 of the Penal Code, as amended by Act VIII of 1882, is unaffected by Chap. XXII, *post*, of this Code. See *Empress* v. *Asghar Ali*, I. L. R., 6 All., 61.

It is not illegal, it has been held, to impose solitary confinement in summary trials under Chap. XXII. Section 262, *post*, only limits the imprisonment to a term of three months. It does not interfere with a Court's powers under s. 73 of the Penal Code to order solitary confinement, or with the similar powers given by s. 32 (*a*) of this Code.—*Empress* v. *Annu Khan*, I. L. R., 6 All., 83.

34. The Court of a District Magistrate, specially empowered under section 30, may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years; but any sentence of imprisonment for a term exceeding four years, and any sentence of transportation, shall be subject to confirmation by the Sessions Judge. [Act X of 1886, s. 2.]

Higher powers of certain District Magistrate.

As to powers of District Magistrates in case of proceedings against European British subjects, see ss. 443, 444, and 446, *post*, as amended by ss. 3, 4 and 5 of Act III of 1884. As to appeals, see s. 408, *post*.

When a Deputy Commissioner's order requires the sanction of the Sessions Judge, the High Court has no jurisdiction to entertain an appeal from it until it is sanctioned.—*Reg.* v. *Sham Soonder Doss*, 25 W. R., Cr., 18.

The latter part of this section refers to cases in which the sentence of imprisonment is a sentence of upwards of three years without reference to any additional sentence as to fine or whipping.—*In re Shumsher Khan*, I. L. R., 6 Calc., 624.

In the case of *Empress* v. *Paramanund*, 13 C. L. R., 375; (S. C.) I. L. R., 10 Calc., 85, where a Deputy Commissioner specially empowered under this section proceeded to try a charge, under s. 304 of the Indian Penal Code, of culpable homicide not amounting to murder, there being some evidence which would, if believed, have supported a charge of murder, but which the Court did not consider sufficiently strong to warrant such a charge, the Sessions Judge, to whom the sentence was submitted for confirmation, referred the matter to the High Court to have the sentence set aside and the Deputy Commissioner directed to commit the case to the Sessions. The High Court held that, having regard to the provisions of s. 209, *post*, which empowers a Magistrate holding an enquiry to try the case himself if he thinks that only an offence within his jurisdiction has been committed, it was impossible to say that the Court had acted without jurisdiction, merely because there was some evidence which, if believed, would substantiate a charge of murder. Where there is such evidence, however, an officer empowered under this section incurs a grave responsibility if he tries the case himself. See notes to s. 204, *post*.

35. When a person is convicted, at one trial, of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict: such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct.

Sentence in cases of conviction of several offences at one trial.

It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Maximum term of punishment.

Provided as follows:—

(*a*) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years:

Ch. III s. 35 (*b*) if the case is tried by a Magistrate (other than a Magistrate acting under section 34), the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

For the purpose of confirmation or appeal, aggregate sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

This section corresponds, with some slight verbal alterations, with s. 314 of Act X of 1872 (see also Act X of 1875, s. 109, and Act IV of 1877, s. 13). The words "in such order as the Court may direct," at the end of the first paragraph, are new.

The last clause as to appeal is taken from the judgment of the Bombay High Court in the case of *Reg.* v. *Rama Bhiogowda*, I. L. R., 1 Bom., 222; cf. *Reg.* v. *Gulam Abbas*, 12 Bom. H. C. R., 147, a case decided under s. 463 of Act X of 1872, and *Empress* v. *Harahdone Tamuli*, 3 C. L. R., 511.

A Magistrate is not entitled to split up an offence for the purpose of giving himself jurisdiction over the parts which he would not have had over the whole, and thus deprive the prisoner of an appeal.—*Empress* v. *Abdul Kurim*, I. L. R., 4 Calc., 18.

Section 71 of the Indian Penal Code (Act XLV of 1860), as amended by Act VIII of 1882, s. 4, provides, that where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of his offences, unless it be so expressly provided; that where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or when several acts of which one or more than one would by itself or themselves constitute an offence constitute when combined a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

The direction that a sentence of imprisonment in one case is to run from the date of the expiration of the sentence in a previous case should appear in the body of the sentence, and should also be inserted in the warrant.—*Mad. H. C. Pro.*, *23rd December* 1873; *Weir*, p. 16.

This section, like s. 314 of Act X of 1872, does not embrace the case of separate trials held on the same day for separate offences committed by the same person, but has reference only to the conviction of the accused person of two or more offences at *one* trial.—*Mad. H. C. Pro.*, *5th June* 1879, *Weir*, p. 16.

Where a person who has been 'previously convicted' is convicted at one time of two or more offences, he may be punished with one, but only one, whipping in addition to any other punishment to which under this section he may be liable.—*Nassir* v. *Chunder*, 9 W. R., Cr, 41. But where a person who has not been 'previously convicted' is convicted at one time of two or more offences, it is illegal to sentence him to whipping for one of those offences in addition to imprisonment or fine for the other or others; but it is not illegal to sentence him to one whipping in lieu of all other punishments.—*Ibid.* See also *Rutton Bewa* v. *Buhur*, 14 W. R., Cr., 7, and *Reg.* v. *Kantiram and Meekeer*, 1 W. R., Cr., 24.

Where a person is convicted in two cases by two different tribunals, and on appeal the conviction in the first case is set aside, the imprisonment undergone should be reckoned as imprisonment under the sentence passed on the second conviction.—*Mad. H. C. Pro.*, *15th Feb.* 1879, *Weir*, p. 16.

It should be borne in mind that, under s. 233, for every distinct offence of which any person is accused, there must be a separate charge, and every such charge must be tried separately except in the cases mentioned in ss. 234, 235, 236, and 239. See the notes to s. 233 and to the sections referred to therein.

Where a person who is accused of several offences of the same kind is tried for each of such offences separately by a Magistrate, the aggregate punishment

which such Magistrate can inflict on him, in respect of such offence, is not limited to twice the amount which he is by his ordinary jurisdiction competent to inflict, but such Magistrate can inflict on him for each offence the punishment which he is by his ordinary jurisdiction competent to inflict.—*In re Daulatia*, I. L. R., 3 All., 305 (Full Bench). There a person accused of theft on the 1st August, and of house-breaking by night in order to steal on the 2nd August, both offences involving a stealing from the same person, was charged and tried by a Magistrate of the first class at the same time for such offences, and sentenced to rigorous imprisonment for two years for each of such offences. The Full Bench held, that the joinder of the charges was regular under s. 453 of Act X of 1872 (s. 234 of this Code), and that the punishment was within the limits prescribed by s. 314. Ch. II s. 36

In the case of *Empress* v. *Dungar Singh*, I. L. R., 7 All., 29, it was held that the offences of rioting, of voluntarily causing hurt, and of voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences within the meaning of s. 35 of the Code. Accordingly, a person accused of rioting and of voluntarily causing grievous hurt might, under the first paragraph of s. 235, *post*, be charged with, and tried for, each offence at one trial, and a separate sentence might be passed in respect of each under s. 35—See *Empress* v. *Ram Partab*, I. L. R., 6 All., 121. The former case was followed by TOTTENHAM and GHOSE, JJ., in *Lokenath Sircar* v. *Empress*, I. L. R., 11 Calc., 349. There A and B were charged with rioting, armed with deadly weapons, under s. 148 of the Penal Code, and they were also charged under s. 324, coupled with s. 149, with causing hurt by a dangerous weapon to X, and B was further charged, under s. 324, with causing like hurt to Y, A being also charged under s. 324, coupled with s. 149, in respect of the hurt caused by B to Y. A and B were convicted on all charges, and separate sentences to take effect in succession were awarded in respect of each offence charged. The offences under s. 234 were committed during the riot. It was held that the several acts with regard to which the prisoners were charged did not fall within the provisions of s. 71 of the Indian Penal Code, inasmuch as it was not found that the causing of the hurt was the force or violence which alone constituted the rioting, and that consequently, under s. 235, *post*, the several sentences passed were strictly legal. See *Reg.* v. *Durzoolla*, 9 W. R., Cr., 33; *Queen* v. *Dina Sheikh*, 10 W. R., Cr., 63; *Queen* v. *Shahabut Sheikh*, 13 W. R., Cr., 42; and *Empress* v. *Jubdar Kazi*, I. L. R., 6 Calc., 718; (S. C.) 8 C. L. R., 390.

A conviction under the Indian Penal Code, and also under a special law, is illegal.—*Reg.* v. *Hussain Ali*, 5 All. H. C. R., 49.

Where prisoners were charged, both with rioting, being armed with deadly weapons, and with causing hurt by shooting, and their conviction of the latter offence rested solely on the fact of their belonging to a party by one of whom (not one of the prisoners) fire-arms were used, it was held, that it was wrong to pass a cumulative sentence, and to punish the prisoners both for rioting and causing grievous hurt.—*Reg.* v. *Durzoolla*, 9 W. R., Cr., 33.

It is an irregularity on the part of an Assistant Judge not to pass a separate sentence for each offence of which a prisoner has been found guilty, but it is not in itself an error or defect in consequence of which the High Court can reverse or alter the sentence.—*Reg.* v. *Vinayek Trimbak*, 2 Bom. H. C. R., 414; *Reg.* v. *Murar Trikam*, 5 Bom. H. C. R., Cr., 3.

C.—Ordinary and Additional Powers.

Ordinary powers of Magistrates.

36. All District Magistrates, Subdivisional Magistrates and Magistrates of the first, second and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their "ordinary powers."

The ordinary powers of Magistrates of all classes were described in ss. 22, 24,

Ch. III ss. 37-39 26, 28, and 30 of Act X of 1872. These powers are now specified in Schedule III of this Code.

Criminal cases in the Panjab against European or Native soldiers can only be taken up by Magistrates of the first class.—*Panjab Gazette*, 1880, *Part III*, p. 77.

Additional powers conferrible on Magistrates.

37. In addition to his ordinary powers any Subdivisional Magistrate or any Magistrate of the first, second or third class may be invested by the Local Government or the District Magistrate, as the case may be, with any powers specified in the fourth schedule as powers with which he may be invested by the Local Government or the District Magistrate.

The power of the Local Government to invest Magistrates of the first, second, or third class with special powers was conferred by ss. 23, 25, 27, and 29 of Act X of 1872. The additional powers with which Mofussil Magistrates may be invested are now specified in Schedule IV to the Code.

In the Panjab, Magistrates conferring powers on their subordinates should report to the Chief Court.—*Panjab Gazette*, 1873, p. 75.

Under the authority vested in him by s. 29 of Act X of 1872, the Governor of Madras was pleased to confer on every Magistrate of a district, exercising the powers of a Magistrate of the first class, the power of summary trials which was vested in the Magistrate of the District by s. 222 (s. 260 of this Code) of the same Act.—*Madras Gazette*, 1874, p. 1182.

Control of District Magistrates' investing power.

38. The power conferred on the District Magistrate by section 37 shall be exercised, subject to the control of the Local Government.

This section is new.

D.—Conferment, Continuance, and Cancellation of Powers.

Mode of conferring powers.

39. In conferring powers under this Code, the Local Government may by order empower persons specially by name or in virtue of their office, or classes of officials generally by their official titles.

Every such order shall take effect from the date on which it is communicated to the person so empowered.

The first paragraph of this section corresponds with s. 43 of Act X of 1872. The last paragraph is new. See *In re Mohomed Ishák*, I. L. R., 6 Calc., 476.

The persons holding the office of Cantonment Magistrate at Mhow, Morar, Nowgong, and Neemuch were, under s. 43 of Act X of 1872, invested with the powers of a Magistrate of the District within the limits of their respective Cantonments.—*Gazette of India*, 1875, p. 198.

On the 8th August 1884, a Magistrate of the second class began an inquiry in a case in which several persons were accused of rioting and of voluntarily causing grievous hurt. On the 6th September, the powers of a Magistrate of the first class were conferred on the Magistrate by an order of Government, which was communicated to him on the 8th September. On the 9th September, the case for the prosecution having closed, the Magistrate framed charges against each of the accused under ss. 323 and 325 of the Penal Code, recorded the statements of the accused and the evidence for the defence, and, on the 10th September, convicted

the accused of all the charges, passing upon each of them, in respect of each charge, sentences which he could pass as a Magistrate of the first class, but could not have passed as a Magistrate of the second class. On appeal, the Sessions Judge, on the ground that the prisoners had committed the offence described in s. 148 of the Penal Code, held that the sentences passed by the Magistrate were illegal as being inconsistent with the provisions of s. 71 of the Penal Code, paragraphs 2 and 4; and he accordingly reduced the sentences to imprisonment, which the Magistrate had passed, to the maximum of imprisonment which the Magistrate could have inflicted under s. 148. It was held by the Full Bench (PETHERAM, C.J., and BRODHURST, J., dissenting) that the sentences passed by the Magistrate were legal.

OLDFIELD, MAHMOOD, and DUTHOIT, JJ., held that, with reference to the terms of s. 39 of the Criminal Procedure Code, a Magistrate of the second class who had began a trial as such and continued it in the same capacity up to the passing of sentence, and who, prior to passing sentence, had been invested with the powers of a Magistrate of the first class, was competent to pass sentence in the case as a Magistrate of the first class, while PETHERAM, C.J., considered that a case must be taken to be tried upon the day the trial commences; that, for all the purposes of the trial, the Magistrate in this case retained the *status* of a Magistrate of the second class; and that he was therefore not competent to pass sentence as a Magistrate of the first class.—*Empress* v. *Pershad,* I. L. R., 7 All. (F. B.), 414.

Continuance of powers of officers transferred.

40. Whenever any person holding an office in the service of Government, who has been invested with any powers under this Code throughout any local area, is transferred to an equal or higher office of the same nature within a like local area under the same Local Government, he shall, unless the Local Government otherwise directs, or has otherwise directed, continue to exercise the same powers in the local area to which he is so transferred.

This section corresponds with s. 56 of Act X of 1872. The words 'throughout any local area' have been added in order to show that powers conferred by one Local Government do not accompany an officer when he is transferred to a province under another Local Government. This alteration was made in consequence of the decision in the case of *Re Pursooram Borooah,* I. L. R., 2 Calc., 117. There the petitioner had been convicted by Mr. Carnegy, the Assistant Commissioner of Kamroop, in the exercise of a summary jurisdiction under s. 222 of Act X of 1872. Mr. Carnegy was, in the year 1872, in charge of the Jorehaut Division, in the district of Seebsaugor, 'with first class powers and powers under s. 222 of the Act.' In 1874, he proceeded on furlough to England, and on his return, in 1875, was 'posted' to the district of Kamroop, and invested with the powers of a Magistrate of the first class. It was held that s. 56 did not apply, and that Mr. Carnegy had no summary jurisdiction in Kamroop. See *Bisheshar Nath* v. *Empress,* Punjab Rec., 1884, p. 20.

Where a Magistrate was appointed to a certain district, and subsequently was appointed to another district, "on being relieved," and after being relieved, passed sentence in a pending case,—it was held that, as soon as he was relieved, he could exercise no jurisdiction, and his sentence was set aside.—*Empress* v. *Anand Sarup,* I. L. R., 3 All. (F. B.), 563.

Powers may be cancelled.

41. The Local Government may withdraw any powers conferred under this Code on any person by it or by any officer subordinate to it.

Compare s. 54 of Act X of 1872.

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PART III.

GENERAL PROVISIONS.

CHAPTER IV.

OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE, AND PERSONS MAKING ARRESTS.

Public when to assist Magistrates and police.

42. Every person is bound to assist a Magistrate or Police-officer reasonably demanding his aid, whether within or without the Presidency-towns,

(*a*) in the taking of any other person whom such Magistrate or Police-officer is authorized to arrest ;

(*b*) in the prevention of a breach of the peace, or of any injury attempted to be committed to any railway, canal, telegraph or public property ; or

(*c*) in the suppression of a riot or an affray.

This section corresponds substantially with s. 91 of Act X of 1872. See also Act IV of 1877, s. 247. But to the offences which the public are bound to assist in preventing have been added attempts to injure such public property as railways and canals. The word 'reasonably' in the first paragraph has been added.

As to the dispersion of unlawful assemblies, see ss. 127 to 132, *infra*.

(*a*) Under s. 187 of the Indian Penal Code the intentional omission to assist a public servant in the execution of his public duty is punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both ; and if such assistance be demanded for the purpose of executing process, preventing the commission of an offence, suppressing a riot or affray, or of apprehending a person charged with a guilty knowledge of an offence, or of having escaped from lawful custody, the penalties may extend to simple imprisonment for six months, or fine of one hundred rupees, or both.

As to the right of private defence, see Penal Code, s. 99.

(*b*) Whoever knowingly joins, or continues in, an assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation.—If the assembly is an unlawful assembly within the meaning of s. 141, the offender will be punishable under s. 145.—*Penal Code, s.* 151.

(*c*) Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.—*Penal Code, s.* 146.

When two or more persons, by fighting in a public place, disturb the public peace, they are said to 'commit an affray.'—*Penal Code, s.* 159.

See, as to the liabilities of the owners or occupiers of land, and their agents, on which unlawful assemblies are held or riots committed, *Penal Code, ss.* 154, 155, 156.

Where a Magistrate directed a landholder to find a clue in a case of theft within fifteen days and to assist the police, it was held, that the order was not authorized by ss. 90 and 91 of Act X of 1872 (ss. 45 and 42 of this Act).—*Empress v. Bakkshi Ram*, I. L. R., 3 All., 201.

*By § 1 Act X of 1894.

In section 44 the figures 143, 144, 145, 147, 148 shall be inserted between the figures "130" and the figures "302".

• Added by Act III of 1894.

• Any act committed, at any place out of British India, which, if committed in British India would be punishable under any of the following sections of the Indian Penal Code, namely 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435-436, 449, 450-457, 458, 459 and 460 shall be deemed to be an offence for the purposes of this section."

Aid to person other than Police-officer executing warrant.

43. When a warrant is directed to a person other than a Police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

This corresponds with Act X of 1872, s. 163.

This section does not impose any obligation on the public to aid in the execution of a warrant, but indemnifies any person who gives the person executing the warrant any assistance. As to when persons are bound to give assistance to Magistrates and Police, see the preceding section.

A warrant may be directed by a District Magistrate or Subdivisional Magistrate to any landholder, farmer, or manager of land within the district or subdivision.—S. 78, *post.*

Where a warrant is directed to any Police-officer, it may also be executed by any other Police-officer whose name is endorsed upon the warrant by the officer to whom it is endorsed or directed.—S. 79, *post.*

Public to give information of certain offences.

44. Every person, whether within or without the Presidency-towns, aware of the commission of, or of the intention of any other person to commit, any offence punishable under the following sections of the Indian Penal Code (namely) 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449. 450, 456, 457, 458, 459, and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or Police-officer of such commission or intention.

The offences enumerated in this section are the same as those enumerated in s. 89 of Act X of 1872. That section imposed the obligation of giving information upon persons aware of the commission of the offences specified. This section, it will be seen, goes further, and imposes that obligation on persons aware of the intention to commit any such offences, and the information is to be given 'forthwith.' See also Act IV of 1877, s. 46.

The following are the offences of which information must be given:

Offences against the State.

121. Waging or attempting to wage war, or abetting the waging of war, against the Queen.

121A. Conspiracy to commit offences punishable by the preceding section.

122. Collecting arms, etc., with the intention of waging war against the Queen.

123. Concealing with intent to facilitate a design to wage war.

124. Assaulting the Governor-General, the Governor of any Presidency, a Lieutenant-Governor or a Member of Council, with intent to compel or restrain the exercise of any lawful power.

124A. Exciting disaffection.

125. Waging war against any Asiatic power in alliance with the Queen.

126. Committing depredation in the territories of any power at peace with the Queen.

130. Aiding escape of, or rescuing or harbouring, a prisoner of State or War.

Offences affecting the human body.

302. Murder.

303. Murder by a life-convict.

304. Culpable homicide not amounting to murder.

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Offences against property.

382. Theft after preparation made for causing death or hurt, in order to the committing of the theft.

392. Robbery.

393. Attempt to commit robbery.

394. Voluntarily causing hurt in committing robbery.

395. Dacoity.

396. Dacoity with murder.

397. Robbery or dacoity with attempt to cause death or grievous hurt.

398. Attempt to commit robbery or dacoity when armed with deadly weapon.

399. Making preparation to commit dacoity.

402. Assembling for purpose of committing dacoity.

435. Mischief by fire or explosive substance with intent to cause damage to the amount of Rs. 100.

436. Mischief by fire or explosive substance with intent to destroy a house, &c.

449. House-trespass in order to the commission of an offence punishable with death.

450. House-trespass in order to the commission of an offence punishable with transportation for life.

456. Lurking house-trespass or house-breaking by night.

457. Lurking house-trespass or house-breaking by night, in order to the commission of an offence punishable with imprisonment.

458. Lurking house-trespass or house-breaking by night, after preparation made for causing hurt to any person.

459. Grievous hurt caused whilst committing lurking house-trespass or house-breaking.

460. Being jointly concerned in committing lurking house-trespass by night, or house-breaking, in the course of the commission of which offence death or grievous hurt is caused or attempted.

Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.—*Indian Penal Code, s.* 154.

Under s. 176 of the Indian Penal Code, the omission to give notice or information to a public servant by a person legally bound to give notice or information is punishable. So the intentional omission to give information of an offence, by a person bound to give such information, is punishable under s. 202. As to what is an offence, see s. 40 of the Penal Code as amended by Act XXVII of 1870 and by Act X of 1886.

Village headmen, landholders and others bound to report certain matters.

45. Every village headman, village watchman, village police-officer, owner or occupier of land, and the agent of any such owner or occupier, and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards, shall forthwith communicate to the nearest Magistrate, or to the officer in charge of the nearest Police-station, whichever is the nearer, any information which he may obtain respecting—

(*a*) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of

Omission to give information to Police of offence.

§ 45. Where one of several persons bound to give information to the Police under § 4[illegible] of the Criminal Procedure Code gave such information as to the commission of a murder in consequence of which a Police officer arrived in the village shortly after the occurrence, held, that the fact ~~that~~ other persons who might possibly also be bound to give that information had omitted to do so was no ground for their prosecution and conviction of an offence under § 176 of the Penal Code.

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(f) any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property respecting which the District magistrate by general or special order made with the previous sanction of the Local Govt. has directed him to communicate information.

added by Act III 1894.

(e) the commission of, or intention to commit, at any place out of British India near such village any act which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460.

*(f). In this section—

(i) "village" includes village lands; and

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any court or authority established or continued by the Governor-General in Council in any part of India in respect of any act which if committed in British India would be punishable under any of the following sections of the Indian Penal Code namely 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

which he is headman, watchman or Police-officer, or in which he owns or occupies land, or is agent, or collects revenue or rent; Ch. IV s. 45

(b) the resort to any place within, or the passage through, such village, of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender;

(c) the commission of, or intention to commit, any non-bailable offence in or near such village;

(d) the occurrence therein of any sudden or unnatural death or of any death under suspicious circumstances.

EXPLANATION.—In this section 'village' includes village-lands.

This section corresponds substantially with s. 90 of Act X of 1872. The duties imposed by it have been extended to village police-officers. Further, the section has been extended to escaped convicts or proclaimed offenders, and (to provide for villages in hill passes through which bands of dacoits habitually proceed) also to cases where the criminal merely goes through the village.

Residence in a dwelling-house belonging to another is not occupation of land within the meaning of the section.—*In re Mudhoosoodun Chuckerbutty*, 23 W. R., Cr., 60.

Section 90 of Act X of 1872 provided, that "every owner or occupier of land, *or* the agent of any such owner or occupier," should report. The present section, it will be seen, provides that the owner, &c., *and* his agent shall report. This alteration was made in consequence of the doubt raised in the case of *Empress* v. *Achiraj Lall*, I. L. R., 4 Calc., 603; (S. C.) 3 C. L. R., 87, as to whether an agent was bound to give any information except in the case mentioned in the last clause, *viz.*, of a sudden or unnatural death. This clause has been altered, and information must now be given, not only of sudden or unnatural deaths, but of deaths under suspicious circumstances. The duty of giving such information arises only when the death takes place at or near the village where the person bound to give the information resides.—*In re Mudhoosoodun Chuckerbutty*, 23 W. R., Cr., 60. A 'kazanchi' is not an 'agent' within the meaning of this section. A 'dewan' may be an 'agent' if his master is absent; but the provisions of the section do not apply to a dewan who is acting only under the orders of his resident master.—*Empress* v. *Achiraj Lall*, I. L. R., 4 Calc., 603; (S. C.) 3 C. L. R., 87. And a village accountant and village Munsif's peon do not come within the clauses of persons bound to give information.—*In re Raminihi Nayar*, I. L. R, 1 Mad., 266.

The liability of the resident agent of an owner arises, when the owner is not resident, and has no personal knowledge of the fact required to be reported. Where the owner has such knowledge, the liability attaches to him.—*In re Mudhoosoodun Chuckerbutty*, 23 W. R., Cr, 60.

The provisions of the section should not be put in force against one who has omitted to give information to the police of an offence having been committed in cases where the police have actually obtained such information from other sources.—*Empress* v. *Sashi Bhusan Chuckrabutty*, I. L. R., 4 Calc., 623; *In re Pandya*, I. L. R., 7 Mad., 436.

In order to support a conviction for not having given information under this section, it must appear what the offence is as to the commission of which the accused wilfully omitted to give information; that the specified offence was in fact committed by some one; and that the accused knew of its having been committed.—*Reg.* v. *Ahmed Ali*, 22 W. R., Cr., 42.

Section 21 of the Criminal Tribes Act (XXVII of 1871) provides, that it shall be the duty of every village headman and village watchman in a village in which any persons belonging to a tribe, class or gang, which has been declared criminal,

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reside, and of every owner or occupier of land on which any such persons reside, to give the earliest information in his power at the nearest Police-station of—

(1) the failure of any such person to appear and give information, as directed in section eight;

(2) the departure of any such person from such village, or from such land (as the case may be), and it shall be the duty of every village headman and village watchman in a village, and of every owner or occupier of land, to give the earliest information in his power at the nearest Police-station of the arrival at such village, or on such land (as the case may be), of any persons who may reasonably be suspected of belonging to any such tribe, class, or gang.

Section 22 of the same Act makes a person neglecting to give information punishable under s. 176 of the Indian Penal Code.

Section 176 of the Indian Penal Code provides punishment for the intentional omission to give notice or information to a public servant by a person legally bound to give notice or information. Section 177 of the same Code deals with the punishment for knowingly furnishing false information. See *In re Pandya Nayak*, I. L. R., 7 Mad., 436.

In the case of *Matuki Misser* v. *Empress*, I. L. R., 11 Calc., 619, it was held by PRINSEP and MACPHERSON, JJ., that it was not necessary, in order to support a conviction under s. 176 of the Indian Penal Code against a person falling within the provisions of this section of the Criminal Procedure Code for not giving information of an occurrence falling under cl. (*d*) of that section, to show that the death actually occurred on the land, when the circumstances disclosed showed that a body had been found under circumstances denoting that the death was sudden, unnatural or suspicious, the finding of the body being a fact from which a Court might reasonably infer, in the absence of evidence to the contrary, that the death took place there. MITTER, J., dissented from the judgment of these learned Judges, considering it was necessary to secure a conviction to prove that the death took place or occurred in the village or the land of the accused, and that the finding of a body there did not of itself afford that proof. See *Empress* v. *Abdul Kadir*, I. L. R., 3 All., 279; *Queen* v. *Hardut Surma*, 8 W. R., Cr., 68.

CHAPTER V.

OF ARREST, ESCAPE, AND RETAKING.

A.—Arrest generally.

Arrest how made.

46. In making an arrest, the Police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Resisting endeavour to arrest.

If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such Police-officer or other person may use all means necessary to effect the arrest.

Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death, or with transportation for life.

The first paragraph of this section is the same as s. 177 of Act X of 1872. The second corresponds to a certain extent with s. 178 of the same Act. The use of necessary means to effect the arrest has been extended to meet the case of attempts to evade arrest.

45A (added by Act X of 1894).
Subject to rules in this behalf to be made by the Local Government, the District Magistrate may from time to time appoint one or more persons to be village headman for the purpose of the last foregoing section in any village for which there is no such headman appointed under any other law.

There is no right of private defence against an act, which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant or by his direction acting in good faith under colour of his office, though that act may not be strictly justifiable by law; but a person is not deprived of the right of private defence against an act done or attemped to be done by a public servant as such, unless he knows or has reason to believe that the person doing the act is such public servant; nor is he deprived of the right of private defence against an act done or attempted to be done by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or, if he has authority in writing, produces such authority, if demanded.—*Penal Code*, *s.* 99. Ch. V ss. 47-48

In making the arrest under a warrant, the Police-officer or other person executing the warrant, must notify the substance of the warrant to the person to be arrested, and, if required, must show him the warrant.—S. 80, *infra*. See *Empress* v. *Amer Nath*, I. L. R., 5 All, 318.

Resistance or obstruction by a person to the lawful apprehension of himself or of another, are punishable under ss. 224 and 225 of the Indian Penal Code.

In the case of *Codd* v. *Cabe*—45 L. J., Mag. Ca., 101; L. R., 1 Exch. Div., 352; 34 L. J., 453; 13 Cox, C. C., 202—a warrant had been issued, addressed to all Police-officers of Devon for the arrest of C for trespass in pursuit of conies. It was held that C was justified in resisting a constable who attempted to arrest him without having the warrant in his possession, although it was not shown that the production of the warrant was required by C. The case was appealed, and it was held that a person against whom a warrant has been issued for an offence less than felony (all Police-officers being empowered to arrest without warrant in case of felony), cannot be arrested by a constable who has not the warrant in his possession at the time of the arrest. See *Empress* v. *Amar Nath*, I. L. R., 5 All., 318.

Where a Police-officer makes an arrest in a case in which he is not authorized to arrest without a warrant, or where a warrant has been issued and he makes the arrest without having the warrant in his possession (s. 80, *post*), it would seem he might be charged under s. 342 of the Indian Penal Code with wrongful confinement. But see *Reg.* v. *Budrool Hossein*, 24 W. R., Cr., 51, which, however, is a case in which it does not appear from the report whether the person arrested was charged with an offence for which he could not be arrested without a warrant.

Search of place entered by person sought to be arrested.

47. If any person acting under a warrant of arrest, or any Police-officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such Police-officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

These provisions correspond substantially with those in ss. 99 and 179 of Act X of 1872. As to resistance to lawful authority, see Penal Code, ss. 183, 184; as to obstructing a public servant, ss. 186 and 187; as to harbouring an offender, ss. 212 and 216; and as to a person resisting or obstructing the lawful apprehension of himself or of another person, s. 225 of that Code.

A person, though not a Police-officer, having power to arrest and not acting under a warrant, may pursue and arrest a person escaping from legal custody.—Ss. 66 and 67, *post*.

Procedure where ingress not obtainable.

48. If ingress to such place cannot be obtained under section 47, it shall be lawful, in any case, for a person acting under a warrant, and in any case in which a warrant may issue,

Ch. V ss. 49-51

but cannot be obtained without affording the person to be arrested an opportunity of escape, for a Police-officer, to enter such place and search therein, and

in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if, after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance:

Breaking open zenana.

Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public, such person or Police-officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw, and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

Compare ss. 100, 180, and 181 of Act X of 1872. The last paragraph as to breaking open a zenana gives more extensive powers than those contained in s. 181 of Act X of 1872, which applied only where the person to be arrested was accused of an offence for which a warrant might issue. See ss. 66 and 67, *post.*

The procedure here laid down applies also to search-warrants—S. 102, *post.*

Power to break open doors and windows for purposes of liberation.

49. Any Police-officer or other person authorized to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

This section is new. See ss. 66 and 67, *post.*

No unnecessary restraint.

50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

This is the same as s. 182 of Act X of 1872.

Every Police-officer, who is guilty of offering any unwarrantable personal violence to any person in his custody, is liable, on conviction before a Magistrate, to a penalty not exceeding three months' pay, or to imprisonment, with or without hard labour, for a period not exceeding three months, or to both—*Act V of* 1861, *s.* 29. See *Bussoram Doss*, 19 W. R., Cr., 36, and ss. 62 and 63, *post.*

Whoever, being in any office which gives him legal authority to keep persons in confinement, corruptly or maliciously keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, is punishable with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.—*Indian Penal Code, s.* 220.

Search of arrested persons.

51. Whenever a person is arrested by a Police-officer under a warrant which does not provide for the taking of bail, or under a warrant

which provides for the taking of bail, but the person arrested cannot furnish bail, and

whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,

the officer making the arrest, or, when the arrest is made by a private person, the Police-officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing apparel, found upon him.

This section corresponds with s. 387 of Act X of 1872.

The provision as to the conduct of a private person acting under a warrant of arrest is new. The direction to forward a list of articles seized, with the daily diary or with the final report of the police, has been omitted.

As to procedure by the police upon seizure of property taken under this section or stolen, see s. 523, *infra*. As to the custody of offensive weapons, see s. 53. See *Bolaki Lall*, 19 W. R., Cr., 7.

52. Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency.

Mode of searching women.

Under Act X of 1872, s. 386, the search was directed to be conducted with strict regard to the 'habits and customs of the country.' It will be observed that an apparent alteration has been made in the present Code, and that the search is now to be conducted by a woman 'with strict regard to decency.' Compare also s. 166 of Act IV of 1877.

53. The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

Power to seize offensive weapons.

This is new.

B.—Arrest without Warrant.

54. Any Police - officer may, without an order from a Magistrate and without a warrant, arrest—

When police may arrest without warrant.

first—any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned;

secondly—any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking;

Ch. V s. 54 *thirdly*—any person who has been proclaimed as an offender either under this Code or by order of the Local Government;

See s. 87, *post*, as to proclamation.

fourthly—any person in whose possession anything is found which may reasonably be suspected to be stolen property, and who may reasonably be suspected of having committed an offence with reference to such thing;

fifthly—any person who obstructs a Police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; ~~and~~

sixthly—any person reasonably suspected of being a deserter from Her Majesty's Army or Navy,

This section applies to the police in the towns of Calcutta and Bombay.

These provisions correspond substantially with those of s. 92 of Act X of 1872, omitting cl. 3. The power to arrest deserters from the navy is new. The old Code contained a section (106) authorizing masters and mates to arrest deserters from ships. There is no corresponding section in the present Code, as the matter is sufficiently provided for by the Merchant Shipping Act. Powers are given to the police to arrest persons without warrant in the following cases:—

The Bengal Police Act (V of 1861) provides (s. 34), that it shall be lawful for any Police-officer to take into custody, without a warrant, any person who within his view commits any of the following offences on any road or in any street or thoroughfare within the limits of any town to which the section extends:

First—Any person who slaughters any cattle or cleans any carcass; any person who rides or drives any cattle recklessly or furiously, or trains or breaks any horse or other cattle.

Second—Any person who wantonly or cruelly beats, abuses, or tortures any animal.

Third—Any person who keeps any cattle or conveyance of any kind standing longer than is required for loading or unloading or for taking up or setting down passengers, or who leaves any conveyance in such a manner as to cause inconvenience or danger to the public.

Fourth—Any person who exposes any goods for sale.

Fifth—Any person who throws or lays down any dirt, filth, rubbish, or any stones or building material; or who constructs any cowshed, stable, or the like, or who causes any offensive matter to run from any house, factory, dung heap, or the like.

Sixth—Any person who is found drunk or riotous, or who is incapable of taking care of himself.

Seventh—Any person who wilfully and indecently exposes his person, or any offensive deformity, or disease, or commits nuisance by easing himself, or by bathing or washing in any tank or reservoir not being a place set apart for that purpose.

Eighth—Any person who neglects to fence in, or duly to protect, any well, tank, or other dangerous place or structure.

By s. 35 of Act XV of 1873, Police-officers in any Municipality in the North-Western Provinces and Oudh, to which the Act has been extended, may exercise the powers given above.

The Criminal Tribes Act (XXVII of 1871) authorizes (s. 20) the arrest, without warrant, of any person registered under the provisions of the Act, who is found in any part of British India beyond the limits prescribed for his residence without such pass as may be required by the rules made under the Act, or in a place or at a time not permitted by the conditions of his pass, or who escapes from a reformatory settlement; and s. 26 provides for the arrest, without warrant, of eunuchs under certain circumstances.

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Seventhly – Any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed at any place out of British India which, if committed in British India would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India.

[illegible] of the police to arrest a person who has committed an offence in foreign territory. I.L.R. 19 Bom 72.

Section 1 of Act III of 1869 (B. C.) empowers Police-officers to arrest, without warrant, any person committing in his view any offence against Act I of 1869 (*an Act for the Prevention of Cruelty to Animals*). Ch. V. s. 54

Clause (1). In the case of *Queen* v. *Behary Sing*, 7 W. R., Cr., 3, the High Court made the following remarks as to the duties of the police on arresting any person without warrant: "What is a reasonable complaint or suspicion must depend on the circumstances of each particular case; but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information. Still less have the police any power to arrest persons, as they appear sometimes to do, merely on the chance of something being hereafter proved against them. Any wilful excess by a Police-officer of his legal powers of arrest is, by s. 220 of the Penal Code, an offence punishable by imprisonment for seven years.

"With regard to persons whose evidence is required by a Police-officer making an inquiry, no power exists to arrest or detain them for a single moment. An officer in charge of a Police-station may, under s. 144 of Act XXV of 1861 (with which s. 160 of this Code corresponds), by an order in writing, require the attendance before him of persons whose evidence is necessary, and the person summoned is bound to obey the order; but in no case can the Police-officer compel a witness by force to attend before him.

"Moreover, if, as is frequently the case, a Police-officer, without arresting a person himself, directs some of the neighbours to take charge of him, the Police-officer is responsible in the same way as if he had himself made the arrest, the person arrested by his order being in law in his custody."

Proof of an unlawful commitment to confinement will not of itself warrant the legal inference of malice. Knowledge that such commitment is contrary to law is a question of fact and not of law, and must be proved to satisfy the requirements of s. 220 of the Indian Penal Code.—*Reg.* v. *Narayan Babaji*, 9 Bom. H. C. R., 346. In the case of *Budhool Hossein*, 24 W. R., Cr., 51, a Sub-Inspector of Police was charged under s. 342 of the Indian Penal Code. There was no evidence of malice or intention of doing an act of the nature spoken of in ss. 339 and 340, and no voluntary obstruction or restraint, although there was probably excessive and mistaken exercise of powers not civilly excusable in a Police-officer. The facts, it was held, did not amount to the criminal offence of wrongful restraint.

As to pursuing an offender into other jurisdictions, see ss. 58 and 66, *post*.

Clause (2). The provisions of this clause are new.

Clause (3). A person may be proclaimed an offender under s. 87, *post*.

Clause (4). Property the possession whereof has been transferred by theft or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect of which the offence of criminal breach of trust has been committed, is designated 'stolen property.' But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.—*Penal Code, s.* 415.

For procedure by police upon seizure of property taken under s. 51 or stolen, see ss. 523—525, *post*.

Clause (4) refers to property which is proved to have been stolen, and not to anything which a Police-officer may choose to imagine has been stolen.—*Sheo Sarun Sahai* v. *Mohomed Fazil Khan*, 10 W. R., Cr., 20. It is not necessary that a formal complaint should have been made in order to authorize a Police-officer to apprehend any person found with stolen property.—*Reg.* v. *Gowree Singh*, 8 W. R., Cr., 28.

Clause (5). Whoever voluntarily obstructs any public servant in the discharge of his public functions is liable to be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.—*Penal Code, s.* 186 And whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged, or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, is liable to be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. The punishment is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.—*Ibid*, 224.

Ch. V s. 54

Clause (6). Section 147 of the Army Discipline and Regulation Act enacts:—

"With respect to deserters, the following provisions shall have effect:

"(1). Upon reasonable suspicion that a person is a deserter, it shall be lawful for any constable, or if no constable can be immediately met with, then for any officer or soldier or other person, to apprehend such suspected person and forthwith to bring him before a Court of summary jurisdiction:

"(2). Where a person is brought before a Court of summary jurisdiction, charged with being a deserter under the Act, such Court may deal with the case in like manner as if such person were brought before the Court charged with an indictable offence, or, in Scotland, an offence:

"(3). The Court, if satisfied either by evidence on oath or by the confession of such person that he is a deserter, shall forthwith, as it may seem to the Court most expedient with regard to his safe custody, cause him either to be delivered into military custody in such manner as the Court may deem most expedient, or until he can be so delivered, to be committed to some prison, Police-station or other place legally provided for the confinement of persons in custody, for such reasonable time as appears to the Court reasonably necessary for the purpose of delivering him into military custody:

"(4). Where the person confesses himself to be a deserter, and evidence of the truth or falsehood of such confession is not then forthcoming, the Court shall remand such person for the purpose of obtaining information as to the truth or falsehood of the said confession, and for that purpose the Court shall transmit, if sitting in the United Kingdom, to a Secretary of State, and if in India, to the General or other Officer commanding the forces in the military district or station where the Court sits, and if in a colony, to the General or other Officer commanding the forces in that colony, a return containing such particulars and being in such form as is specified in the Fifth Schedule to this Act, or as may be from time to time directed by a Secretary of State:

"(5). The Court may from time to time remand the said person for a period not exceeding eight days in each instance, and not exceeding in the whole such period as appears to the Court reasonably necessary for the purpose of obtaining the said information:

"(6). Where the Court causes a person either to be delivered into military custody or to be committed as a deserter, the Court shall send, if in the United Kingdom, to a Secretary of State, and if in India or a colony, to the General or other Officer commanding as aforesaid, a descriptive return in relation to such deserter, for which the Clerk of the Court shall be entitled to a fee of two shillings:

"(7). A Secretary of State shall direct payment of the said fee."—*Vide G.O. No.* 4707.*J.*, 28*th November* 1881.

A village chaukidar is not a Police-officer within the meaning of the section.—*Empress* v. *Kallu*, I. L. R., 3 All., 60.

The police of *all grades* may arrest without warrant any person in possession of contraband salt (s. 24, Act VII of 1864; Mad. Act I of 1882, s. 4); any one carrying any excisable articles liable to confiscation (Excise Act); all native officers and sepoys, excepting subadars, jemadars, and serangs, wearing their uniform coats when not employed on the public service (s. 30, Reg. XX of 1817; see also s. 143, Penal Code); any person who commits any offence made punishable by fine under the Railway Act, if his name and address be unknown, or he is likely to abscond (s. 48, Act IV of 1879); any person who shall be guilty of any offence mentioned in ss. 8, 25, 26, 27, 37, 38, 44, 45 and 46 of the Railway Act (s. 49, Act IV of 1879)—*Bengal Police Manual*, 32; any person found gambling, &c., in public streets (Act II (B. C.) of 1867, s. 11); any person carrying arms, &c., under suspicious circumstances (Arms Act, XI of 1878, s. 12); persons committing an offence contrary to ss. 14 or 16 of the Cantonments Act, III of 1880, s. 17; any person committing in presence of Police-officer, or accused of committing a non-cognizable offence, refusing to give his name and address—S. 57, *post*.

In provinces where the Inland Emigration Act, I of 1882, is in force, if any labourer deserts from his employer's service, such employer, or any person acting on his behalf, may, without a warrant and without the assistance of any Police-officer, arrest such labourer wherever he may be found: Provided that, if such labourer

CRIMINAL PROCEDURE CODE (ACT X OF 1882), SEC. 54—*Offence committed by a British subject in foreign territory—Powers of the Police to arrest for such offence without a warrant—Wrongful arrest—Wrongful confinement—Indian Penal Code (Act XLV of 1860), Sec. 342.*] Section 54 of the Criminal Procedure Code (Act X of 1882) does not empower a police officer to arrest, without a warrant, a British subject in British India on a charge of criminal breach of trust or other cognizable offence committed outside British India.

Mukund was a native Indian subject of the Queen-Empress, residing at Belgaum. A complaint was filed against him in the Sángli State, charging him with committing breach of trust within the territories of that State. Thereupon he obtained an order from the District Magistrate of Belgaum, dated 15th November, 1891, which exempted him from arrest for the offence of criminal breach of trust without a warrant issued by himself or by the Political Agent of the Southern Marátha Country. This order was communicated to Mukund through the accused, who was chief constable at Belgaum. On the 27th November, 1891, a police officer from the Sángli State came to Belgaum with a warrant issued by the Sángli Court for the arrest of Mukund on a charge of criminal breach of trust. The chief constable thereupon directed Mukund's arrest. Mukund brought to the notice of the chief constable the District Magistrate's order of the 15th November, 1891, but he was detained in custody till the matter was reported to the First Class Magistrate, who ordered his discharge. In the meantime the complaint filed against Mukund in the Sángli State was dismissed without requiring his extradition.

Mukund thereupon prosecuted the chief constable on a charge of wrongful arrest and wrongful confinement.

Held, that the chief constable had no power to arrest the complainant without a warrant, and that he was guilty of the offence of wrongful confinement under section 342 of the Indian Penal Code (XLV of 1860). I.L.R. 19 Bom 72

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be found within five miles of the place where a Magistrate resides, or in the service of another employer, he shall not be arrested without warrant. Every Police-officer shall assist in arresting any such labourer if so required by the employer or person acting on his behalf. Whoever arrests a labourer under this section, shall without delay take him to the Police-station nearest to the place of the arrest; and if he fails to do so, shall be punished with fine which may extend to two hundred rupees. Ch. V s. 55

Arrest of vagabonds, habitual robbers, &c.

55. Any officer in charge of a Police-station may, in like manner, arrest or cause to be arrested—

(*a*) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or

(*b*) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or

(*c*) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion, or, in order to the committing of extortion, habitually puts or attempts to put persons in fear of injury.

"This section applies to the police in the towns of Calcutta and Bombay."—[Act X of 1886, s. 3.]

Compare s. 94 of Act X of 1872.

Clause (*a*). Under the old Code, any person found 'lurking' within the limits of the Police-station might be arrested. It will now be necessary, in order to justify the arrest, to show that the person arrested intended to commit a 'cognizable offence.' See s. 4, cl. *q*), for the definition of 'cognizable offence.'

Clauses (*b*) and (*c*) correspond with the provisions in the latter part of s. 94, the last clause of which, authorizing the arrest of persons of 'notoriously bad livelihood,' is omitted.

As to requiring security for good behaviour from the persons mentioned in cls. (*a*) and (*b*), see s. 109, *post;* and as to security from the persons mentioned in cl. (*c*), see s. 110. See further, s. 112, *post,* and *Queen* v. *Syud Hossain Ali Chowdhry*, 8 W. R., Cr., 74.

It is the duty of every Darogah or District Police-officer to apprehend and send to the Magistrate all persons found wandering at large within his district who are deemed to be lunatics, and all persons who are deemed to be dangerous by reason of lunacy.—*Act XXXVI of* 1858, *s.* 4.

Under the European Vagrancy Act, IX of 1874, s. 3, "vagrant" means a person of European extraction found asking for alms, or wandering about without any employment or visible means of subsistence.

The expression "person of European extraction" includes, for the purposes of the Act and these rules, (1) persons born in Europe, America, the West Indies, Australia, and New Zealand; and (2) the legitimate son of a father and grandson of a grandfather so born.—*Rule I, under Act IX of* 1874.

Any Police-officer may, within the limits of the towns of Calcutta, Madras, and Bombay, require any person who is apparently a vagrant to accompany him or any other Police-officer to, and to appear before, the nearest Magistrate of Police, and may, *without those limits*, require any such person to accompany him or any other Police-officer to, and to appear before, the nearest Justice of the Peace exercising the powers of a Magistrate of the first class under the Code of Criminal Procedure.—*Act IX of* 1874, *s.* 4.

Ch. V s. 55 Whenever any person, apparently a vagrant, refuses or fails to comply with any requisition made by a Police-officer under s. 4 of the Act; whenever any person of European extraction commits an offence under s. 23 of the Act in view of a Police-officer; and whenever any Police-officer has reason to think that such offence has been, or is being, committed, the persons so refusing, failing, or offending may be forthwith arrested, without warrant, by the Police-officer, for the purpose of being produced in the usual manner before the officer empowered to deal with the case.—*Rule 111, under Act IX of* 1874.

There are also some provisions for the arrest by Police-officers without warrant in Act No. V of 1869 (the Indian Articles of War). The following is an extract from the Act, published in the *Gazette of India* of the 13th March 1869:—

Whenever any person subject to the said Articles deserts, the Commanding Officer of the regiment, corps, or detachment to which he belongs shall give written information of the desertion to such civil, political, or police authorities as, in his opinion, may be able to afford assistance towards the capture of the deserter; and such authorities shall thereupon take steps for the apprehension of the said deserter, in like manner as if he were a person for whose capture a warrant had been issued by a Magistrate, and shall deliver the deserter, when apprehended, to military custody.

II. Such authorities shall also, by such means as appear to them best adapted for the purpose, prevent persons reasonably suspected to be subject to the said Articles from travelling through the districts subject to their jurisdiction, unless on duty or furnished with a certificate of leave or discharge.

III. Any Police-officer may arrest without warrant any person so suspected, and shall bring him without delay before the nearest Magistrate, or the nearest military Commanding Officer, when no Magistrate is readily accessible, to be dealt with according to law.

APPREHENSION OF MILITARY OFFENDERS.

IV. (*e.*)—Whenever any person subject to the said Articles, who is accused of any military offence, is within the jurisdiction of any civil, political, or police-officer, such officers shall aid in the apprehension and delivery to military custody of such person upon receipt of a written application to that effect signed by his Commanding Officer.

Officers above the rank of head constable and head constable in charge of out-post of the 1st and 2nd grade may arrest (1st) any person having in his possession an unlicensed still, &c., or engaged in the sale of excisable articles (Act VII (B. C.) of 1878, ss. 39 and 41); (2nd) any person concerned in the unlicensed manufacture, &c., of excisable articles, or the occupier of any house in which such unlicensed articles may be found (Act VII (B. C.) of 1878, ss. 41, 40). Any Police Inspector may, in default of security, arrest any cultivator of illegal poppy (Beng. Reg. XX of 1817, s. 29 (9); Act XIII of 1857, s. 24). Darogahs are to apprehend the artificers employed in repairing or building prohibited boats (Reg. XXII of 1793, s. 20).

Officers in charge of Police-stations may, in addition, arrest without warrant all persons concerned in the unlicensed manufacture, &c., of salt (s. 28, Act VII of 1861).

As to special powers of Police in Calcutta, see Beng. Act IV of 1866, ss. 56, 72, 76, and 78; Beng. Act V of 1879, ss. 7, 19, 28, and 29: in Bombay, see Act XIII of 1856, ss. 86, 90, 92, and 94; and Bom. Act IV of 1882, s. 1: and in Madras, see Mad. Act VIII of 1867, ss. 56 and 59.

In the case of *Empress* v. *Kandhaia*, I. L. R., 7 All., 67, an order was issued to a Police-officer directing him to arrest K under this section as a person of bad livelihood. K, with the assistance of three others, resisted apprehension, and escaped: It was held that he was not charged with an offence within the meaning of the term as defined by s. 40 of the Penal Code, and that consequently no offence made punishable by ss. 224 and 225 of the Penal Code had been committed in connection with the evasion of arrest. See *Empress* v. *Shasti Churn Napit*, I. L. R., 8 Calc., 331.

Procedure when Police-officer deputes subordinate to arrest without warrant.

56. When any officer in charge of a Police-station requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence for which the arrest is to be made.

This section corresponds with the first paragraph of s. 102 of Act X of 1872. The last paragraph of that section has been omitted from the present Code.

The order must be in writing, unless the offence is cognizable, in which case any Police-officer may on his own responsibility arrest.—S. 54, *supra*.

Where a head constable verbally ordered a subordinate constable, who was with him, to arrest a person suspected of dacoity, which the constable did in the presence of the superior, it was held, that the arrest was legal, as dacoity is an offence for which any Police-officer may arrest without warrant, and the arrest was virtually made by the head constable.—*Reg.* v. *Shaikh Emoo*, 11 W. R., Cr., 20. If a Police-officer, without arresting a person himself, directs some of the neighbours to take charge of him, the Police-officer is responsible in the same way as if he had himself made the arrest, the person arrested by his order being in law in his custody. —*Queen* v. *Behary Singh*, 7 W. R., Cr., 3.

Refusal to give name and residence.

57. When any person, in the presence of a Police-officer, commits or is accused of committing a non-cognizable offence, and refuses, on demand of a Police-officer, to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained; and he shall, within twenty-four hours from the arrest, be forwarded to the nearest Magistrate, unless, before the expiration of that time, his true name and residence are ascertained, in which case he shall be released on his executing a bond for his appearance before a Magistrate if so required.

Under s. 93 of Act X of 1872, "any person known to have committed, or suspected of having committed, an offence for which a Police-officer is not authorized to arrest without a warrant," and who refused, on demand of a Police-officer, to give his name and residence, might be dealt with as provided in this section. It will be seen that the person must, in the presence of a Police-officer, commit or be accused of committing a non-cognizable offence, and refuse to give his name and residence before he is subject to the provisions of this section. It may be observed here that no Police-officer can investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.—S. 155, *post*.

The provision as to the execution of a bond is new.

See s. 4, cl. (*q*), for the definition of 'non-cognizable offence.'

Pursuit of offenders into other jurisdictions.

58. A Police-officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest under this chapter, pursue such person into any place in British India.

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Compare s. 103 of Act X of 1872.

As to arrest without warrant, see s. 54, *ante*, p. 39 ; and as to arrest in a foreign country, see the Extradition Act (XXI of 1879).

Arrest by private persons.

59. Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence, or who has been proclaimed as an offender;

Procedure on such arrest.

and shall, without unnecessary delay, make over any person so arrested to a Police-officer ; or, in the absence of a Police-officer, take such person to the nearest Police-station.

If there is reason to believe that such person comes under the provisions of section 54, a Police-officer shall re-arrest him.

If there is reason to believe that he has committed a non-cognizable offence, and he refuses, on the demand of a Police-officer, to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no reason to believe that he has committed any offence, he shall be at once discharged.

The first paragraph of this section, except the provision as to the arrest of a person proclaimed as an offender, corresponds with s. 105 of Act X of 1872. The first part of the second paragraph corresponds with the first paragraph of s. 107. The third, fourth, and fifth paragraphs substantially embody the remaining provisions of that section.

Section 87, *post*, deals with the proclaiming of offenders.

Person arrested to be taken before Magistrate or officer in charge of Police-station.

60. A Police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a Police-station.

Compare s. 101 of Act X of 1872.

No person may be detained for more than twenty-four hours; see next section.

Persons arrested by a Police-officer can only be discharged on their own bonds, or on bail, or under the special order of the Magistrate—S. 63, *post*.

Person arrested not to be detained more than 24 hours.

61. No Police-officer shall detain in custody a person arrested without warrant for a longer period than, under all the circumstances of the case, is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Compare Act X of 1872, s. 124, para. 1. That section applied to accused persons generally. Under this section it is only persons arrested without a warrant who may not be detained for more than twenty-four hours. See s. 81, *post*, as to persons arrested under a warrant.

A Magistrate authorizing detention in the custody of the police under s. 167 must record his reasons for so doing. He can only make an order under the section when the accused has been produced before him. See *In re Surendro Nath Roy*, 13 W. R., Cr., 27; (S. C.) 5 B. L. R., 274.

Magistrates should require applications by the police to retain accused persons in their custody for more than twenty-four hours to be on specific grounds, and to show good cause for the presence of the accused at the Police-station being required. —*Smith*, p. 87.

There must be a continuous detention of more than twenty-four hours in order to bring a case within the provisions of this section.—*In re Indrobee Thaba*, 1 W. R., Cr., 5. In no case is a Police-officer justified in detaining a man without reasonable ground before bringing him before a Magistrate. The time during which a person is kept in wrongful confinement is immaterial except with reference to the extent of punishment, the longer the period the more severe being the punishment. —*Reg.* v. *Suprosunnno Ghosaul*, 2 Wym., Cr. Rul., 70; (S. C.) 6 W. R., Cr., 88.

Even if a person be rightly arrested, it does not rest with the discretion of the Police-officer to keep the prisoner in custody where and as long as he pleases. Under no circumstances can he be detained without the special order of a Magistrate for more than twenty-four hours. At the expiration of twenty-four hours, unless the special order has been obtained, the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is absolutely unlawful; and though the Code is not so express upon the place or the time of confinement, it is perfectly clear that it was intended that where a Police-officer arrested any person, the prisoner should not be kept in confinement in any place which the subordinate officer might select, but that he should, if possible, be sent immediately to the Police-station and be placed in the custody of the officer in charge of the station, who is the person intrusted by the Act with the conduct of the enquiry.—*Reg.* v. *Behary Sing*, 7 W. R., Cr., 3. See notes to ss. 167 and 344, *infra*.

The provisions of the section are imperative, and it is not necessary for the Crown to prove that an Inspector of Police charged with having detained prisoners for more than twenty-four hours did so with a guilty knowledge.—*Reg.* v. *Busooram Dass*, 19 W. R., Cr., 36.

If, as is frequently the case, a Police-officer, without arresting a person himself, directs some of the neighbours to take charge of him, the officer is responsible in the same way as if he had himself made the arrest, the person arrested by his order being in law in his custody.—*Reg.* v. *Behary Sing*, 7 W. R., Cr., 3.

The exercise of unwarrantable personal violence by a Police-officer to any person in his custody is punishable under s. 29, Act V of 1861. See s. 50, *supra*.

In all heinous cases, where a single prisoner is sent in by the police, he should be handcuffed. When two or more prisoners are sent in, they should be handcuffed two and two together. In cases not of a heinous nature, prisoners should not be handcuffed unless violent, and then only by the order of the officer in charge of the station.—*Bengal Police Manual*, 2nd Edn., 1882, p. 398.

Police to report apprehensions.

62. Officers in charge of Police-stations shall report to the District Magistrate, or, if he so directs, to the Subdivisional Magistrate the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

This section corresponds substantially with s. 132, para. 1, of Act X of 1872.

The report must be made to the Magistrate of the District, unless he directs it to be made to the Subdivisional Magistrate. The object of this section is, that the judicial branch should promptly exercise authority, if necessary, with regard to all arrests by the police, and it seems to have been framed with this view, that, as no

Ch. V ss. 63-67

person can be released without the order of a Magistrate, except on bail or recognizance, it shall be the Magistrate's responsibility, as well as that of the police, if a person illegally arrested remains unnecessarily in custody.—*Smith*, p. 84.

Discharge of person apprehended.

63. No person who has been arrested by a Police-officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

Compare s. 132, para. 2, of Act X of 1872 The words 'except on his own bond, or on bail,' have been substituted for 'except on bail or on his own recognizances.'

Offence committed in Magistrate's presence.

64. When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

Compare s. 108 of Act X of 1872 and s. 15 of Act IV of 1877. The provisions as to jurisdiction, and giving the Magistrate power to arrest personally, are new.

Arrest by or in presence of Magistrate.

65. Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Compare s. 166, para. 2, of Act X of 1872, and s. 16 of Act IV of 1877. The provisions as to jurisdiction, and giving the Magistrate power to arrest personally, are new.

Power on escape, to pursue and retake.

66. If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in British India.

This and the following section re-enact, with verbal alterations, the provisions of s. 112 of Act XXV of 1861, which were omitted from Act X of 1872.

As to pursuit of offenders into other jurisdictions by a Public-officer, see ss. 54, 58, *ante*, pp. 39, 45.

Provision of sections 47, 48 and 49 to apply to arrests under section 66.

67. The provisions of sections 47, 48 and 49 shall apply to arrests under section 66, although the person making any such arrest is not acting under a warrant and is not a Police-officer having authority to arrest.

See note to preceding section.

§ 68. Section 68 is the only section which provides the procedure for the service of summonses, and any other mode adopted for such service is illegal and not justifiable.

In re Sarat Ch. Chowdhury.

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CHAPTER VI.

OF PROCESSES TO COMPEL APPEARANCE.

A.—Summons.

Form of summons.

68. Every summons issued by a Court under this Code shall be in writing in duplicate signed and sealed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule, direct.

Summons by whom served.

Such summons shall be served by a Police-officer; or, subject to such rules consistent with this Code as the Local Government may prescribe in this behalf, by an officer of the Court issuing it.

This section applies to the police in the towns of Calcutta and Bombay.

Compare ss. 152 and 153 of Act X of 1872 and s. 47 of Act IV of 1877.

For form of summons, see Sched. V, No. I.

'Writing' includes printing, lithography, photography, and engraving and the like.—*Section* 4, *cl.* (*e*). Every summons should be signed in full by the Magistrate by whom it is issued, with the name of his office or the capacity in which he acts. The practice of signing initials only, or using a stamp, is objectionable.—*Smith*, p. 90.

In all processes, the father's name, the caste or tribe, and the residence of the person to be arrested or summoned should be entered so as to place his identity beyond all doubt. The Court from which the process is issued and the name of the district should also be set forth.—*Smith*, p. 92.

In Cantonments, the Commanding Officer of the Cantonment may send any process requiring service or execution by any means not immediately at his disposal to the chief Police-officer in the Cantonment for service or execution through the Cantonment-police; and the said chief Police-officer shall serve or execute such process in the same manner as if it had been issued by the Cantonment Magistrate, and subject to the same rules.—*S.* 11, *Cantonments Act, III of* 1880.

A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and the time of the day when the attendance of the person summoned is required, and it should go on to say that such person is not to leave the Court without leave, and, if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned.—*Per* STRAIGHT, J., *Empress* v. *Ram Saran*, I. L. R., 5 All., 7. If a summons does not state the place at which, or time of the day when the attendance of the person summoned is required, he cannot be punished under s. 174 of the Indian Penal Code for disobedience to the summons.—*Ibid.*

So in Madras it was held, that the summons should specify the place at which the person summoned is required to attend.—*Mad. H. C. Pro.*, 20*th December* 1872; *Weir*, p. 41. Where no place is specified, failure to appear is no offence.—*Ibid*, 30*th November* 1874; *Weir*, p. 41.

In the case of *Emp.* v. *Kisan Bapu*, I. L. R., 10 Bom., 93, the accused, who was summoned to appear and answer a criminal charge, attended at the Magistrate's Court, but not finding the Magistrate present at the time mentioned in the summons, departed after waiting 2 or 3 minutes. The Court held that he was bound to wait a reasonable time, and that he had not done so, and accordingly convicted him under s. 174 of the Penal Code. See *Queen* v. *Sutherland*, 14 W. R., Cr., 20.

By s. 57 of the Presidency Magistrates' Act, IV of 1877 (which has been entirely repealed with the exception of that section), a fee of eight annas must be paid for every summons or warrant issued by a Presidency Magistrate

Ch. VI s. 68 except in the case of a summons to attend and give evidence or to produce documents, in which case there must be paid a fee of four annas:

Provided that such Magistrate may in any case remit any such fee, if he is satisfied that the complainant is unable to pay the same, and shall remit it when the complaint is made by a public servant in the execution of his duty.

The following rules have been framed by the High Court of Judicature at Fort William in Bengal, in accordance with cl. 2, s. 20 of the Court Fees Act, 1870, declaring the fees chargeable for service and execution of the several processes in the Courts of Magistrates in Bengal and Assam :*—

I.—The fees hereinafter mentioned shall be chargeable for serving and executing the processes to which the fees are respectively attached, *viz.*:—

		Rs.	A.	P.
(1)	Warrant of arrest—			
	For the warrant in respect of each person named therein	1	0	0
(2)	Summons—			
	For the summons in respect of one person, or of the first two persons residing in the same place ...	0	8	0
	In respect of every additional person named therein ...	0	4	0
(3)	Proclamation for absconding party under s. 171 (87, *infra*) of the Code of Criminal Procedure—			
	For the proclamation	2	0	0
(4)	Proclamation for witness not attending (s. 353) [87, *infra*]—			
	For the proclamation	0	8	0
(5)	Warrant of attachment—			
	For the warrant	1	0	0
	Where it is necessary to place officers in charge of property attached, for each officer so employed, per diem	0	4	0
(6)	In cases where an application is made by a complainant for the recovery of costs awarded under s. 31, Act VII of 1870, or of compensation granted under s. 308 (545, *infra*), Code of Criminal Procedure, or where a defendant applies for the recovery of compensation awarded to him under s. 209 (250, *infra*) of the Code of Criminal Procedure—			
	For the warrant for the levy of the fine or compensation	0	8	0
(7)	Written order—			
	For the order	1	0	0
(8)	Injunction—			
	For the injunction	1	0	0
(9)	Notice—			
	For the notice	1	0	0

* Published at page 304 of the *Calcutta Gazette* of the 2nd April 1879, and at page 596 of the *Assam Gazette* of the 18th October 1879.

These rules apply only to processes served and executed by Magistrates' establishments. By this, however, it was not intended that processes issued under the orders of a Court of Session should be served without charge, as it was contemplated that such processes should always be issued by the District Magistrate at the discretion of the Sessions Judge (*H. C.* 1818 *of* 1881).

Under cl. 2, s. 68 of Act X of 1882, the Lieutenant-Governor has declared that processes issued under that Act shall be served by peons appointed under the rules framed by the High Court in accordance with s. 22 of the Court Fees Act, VII of 1870. (*Vide Notification, Government of Bengal, the* 11*th May* 1883; *Calcutta Gazette,* 23*rd ibid,* p. 426.)

Similar orders have been passed by the Chief Commissioner, Assam. (*Vide Notification, Judicial Department, No.* 46 *of* 20*th June* 1883; *Assam Gazette of* 23*rd ibid,* p. 290.)

The provisions of s. 31, cls. iii and iv, Act VII of 1870, and of paras. iii and iv of these Rules, apply also to injunctions. Criminal officers are, however, reminded that injunctions in proceedings not connected with *offences* are not chargeable with any fee. An injunction under s. 143, Code of Criminal Procedure, would, for example, be chargeable with the above fee; whereas an injunction under s. 144 or 145 of the Code would not carry any fee (*Rule No.* 10 *of* 26*th September* 1882).

II.—Nothing herein contained shall be deemed to authorize the levying of any fee for any summons to attend as a juror or assessor in a Court of Session, and no fee shall be chargeable on any such summons. Ch. VI s. 68

III.—No fee shall be chargeable in advance on any process of a Criminal Court in any case where the prosecution is on the part of Government, but it shall be competent to any Magistrate in such case, if the accused is convicted, to order that such fees shall be paid by the accused, or any of them, in like manner as if such fees had been paid by the prosecutor in the first instance.

IV.—No process which comes within the operation of Rules I or VI shall be drawn up for service or execution, except upon an application made to the Court for that purpose in writing on a document bearing upon its face stamps not less in amount than the fee which is directed to be charged for serving and executing the process so sought to be drawn up. This application may, however, at the option of the party making it, be included in the petition by which he moves the Court to order the process to issue, but in that case the petition must bear the requisite stamps for the process-fee, in addition to such stamps, if any, as are needed for its own validity: and, in either case, the filing of the application, thus duly stamped, shall constitute payment of the fee chargeable for the process.*

V.—When a proclamation has been issued for an absent witness, if the witness shall afterwards appear, and the Court shall be of opinion that such witness had absconded or concealed himself for the purpose of avoiding the service of a warrant upon him, such Court may order the witness to pay the cost of the proclamation.

Bengal.—Rajshahye, Bograh, Dinagepore, Malda, Rungpore, Bancoorah, Sylhet, Hazareebagh, Beerbhoom, Cachar, Chittagong, Noakhally, Singbhoom, Nowgong, Lohardugga, Manbhoom.
Assam.—Sylhet, Nowgong.

VI.—In the districts named in the margin, where the Subdivisional System has not been fully introduced, in every case where a process has to be executed at a distance of more than 25 miles from the Court from which it is issued, an addition of one-fourth is to be made to the fee chargeable, and if more than 50 miles, an addition of one-half.

Jessore.	Mymensing.
Pabna.	Tipperah.
Dacca.	Noakhally.
Furreedpore.	Sylhet.
Backergunge.	

VII.—In the districts named in the margin, where, during a portion of the year, travelling, except by boat, is impracticable, boat-hire may, when it has to be incurred, be charged in addition to the fees payable under Rules I and VI above. The rates at which such boat-hire shall be charged shall be fixed from time to time by the District Magistrate, and shall be sufficient only to cover on the whole the actual cost of such boat establishment as it may be necessary to maintain for the purpose of serving processes in cases not cognizable by the Police.

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* In exercise of the powers conferred by ss. 26 and 35 of the Court Fees Act, 1870, and of all other powers enabling him in this behalf; and in supersession of Notification by the Government of India in the Financial Department, No. 1520, dated 5th March 1875, and all other notifications on the subject, the Governor General in Council is pleased to issue the following directions:—

I.—When in any case the fee chargeable under the said Act is less than Rs. 10, such fee shall be denoted by adhesive stamps only. Such adhesive stamps shall either be the adhesive stamps bearing the words "court fees," at present in use, or adhesive stamps of any different shape, size, or pattern, bearing the words "court fees," which may hereafter be issued for use, in supersession of, or in addition to, the adhesive stamps now in use.

II.—When in any case the fee chargeable under the said Act amounts to or exceeds Rs. 10, such fee shall be denoted by impressed stamps bearing the words "court fees," adhesive stamps being only employed to make up fractions of less than Rs. 10.

III.—If in any case the amount of the fee chargeable under the said Act involves a fraction of an anna, such fraction shall be remitted.

IV.—This notification shall take effect on and after the 1st June 1883 (postponed to 1st July 1883 by Notification 1236, *Gazette of India*, 2nd June 1883).

[*Notification, Government of India, No.* 361 *of* 18*th April* 1883. (*G. L. No.* 2 *of* 11*th May* 1883).]

For rules to regulate the use of adhesive and impressed stamps in accordance with this notification, see *Calcutta Gazette*, 4th July 1883, Part I, p. 571.

Ch. VI s. 68 VIII.—Subject to the confirmation of the Local Government, the High Court may, by notification in the Government Gazette, on sufficient cause shown, exempt from time to time any district, or part of a district from the operation of all or any of the above rules, and may similarly bring any district, or part of a district, which may be exempt, under the operation of the same.

For paragraphs VII and VIII above, which relate only to Bengal, substitute the following paragraphs VII, VIII, and IX for processes in Assam:—

VII.—In the districts named in the margin, where, during a portion of the year, travelling, except by boat, is impracticable, boat-hire may, when it has to be incurred, be charged in addition to the fees payable under Rules I and VI above. The rates at which such boat-hire shall be charged shall be fixed from time to time by the District Magistrate, subject to approval by the Sessions Judge, and shall be sufficient only to cover on the whole the actual cost of hiring boats or of such boat establishment as it may be necessary to maintain for the purpose of serving processes in cases not cognizable by the Police.

Sylhet.	Nowgong.
Kamroop.	Luckhimpore.

VIII.—In addition to the fees payable under Rules I, VI, and VII, the amount of ferry fees, if any, which may legally be charged for ferries to be crossed by the peon serving the processes, shall be levied in cash from the party at whose instance the process is issued.

IX.—Subject to the confirmation of the Local Government, the High Court may, by notification in the Government Gazette, on sufficient cause shown, exempt from time to time any district, or part of a district, from the operation of all or any of the above rules, and may similarly bring any district, or part of a district, which may be exempt, under the operation of the same.*—*Calc. H. C. C. Os. No.* 13 *of* 2*nd April and No.* 35 *of* 17*th November* 1879. (*Wilkins*, p. 89.)

The following rules have been framed under cl. 3, s. 20 of the Court Fees Act, VII of 1870:—

The following monthly salaries shall be allowed to the peons employed in the service or execution of processes in the Courts of the Magistrates:

1*st.*—In the Court of the Magistrate of the District—
Peons, each ... ... Rs. 7

2*nd.*—In Subdivisional Magistrates' Courts—
Peons, each ... ... Rs. 7

NOTE.—The rates of remuneration for peons, provided by these rules, are intended to secure the services of men who can read and write. But whenever, on the occurrence of a vacancy, candidates thus qualified shall not be available, the Court on whose establishment the vacancy exists may record a declaration to that effect, and may then appoint temporarily some person whom it may consider competent to perform the duties, and who shall be paid at the rate of Rs. 5 per mensem in Munsiff's Courts, and Rs. 6 per mensem in all other Courts; provided that such appointments, when made by a Court subordinate to the District Judge or the Magistrate of the District, shall be subject to the approval of such Judge or Magistrate, and shall cease as soon as duly-qualified candidate shall be procurable. *Wilkins*, p. 94.

The following rules have also been framed by the High Court of Judicature at Fort William in Bengal, in accordance with s. 22 of the Court Fees Act, 1870, for the guidance of Magistrates in Bengal and Assam:†—

1*st.*—The Magistrate of every district shall ascertain the average number of processes issued in a year from his own Court, and from each of the Courts subordinate thereto, during three years last past.

2*nd.*—The peons to be employed in each district shall be in number sufficient for the execution of a like number of processes, each peon being for this purpose considered capable of executing 300 processes per annum.

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* No general rule can be laid down respecting the refund of the value of court-fee stamps, in cases where the fees have been paid into Court for the issue of processes, and such processes have not issued. Each case must be left to the discretion of the Court, and decided on its merits. Where the amount is large, it may well be refunded (*H. C.* 1635 *of* 1882).

† Published at p. 304 of the *Calcutta Gazette* of the 2nd April 1879, and at p. 596 of the *Assam Gazette* of the 18th October 1879.

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3rd.—In the districts named in the margin, where the peons entrusted with a large proportion of processes have to be conveyed by boat, the number of processes which each peon is expected to serve may be reduced by one-third, and the number of peons to be employed shall be calculated accordingly.

Bengal.—Backergunge, Dacca, Jessore, Sylhet, Kamroop, Nowgong.
Luckhimpore, Chittagong, Dinagepore, Mymensing, Rajshahye, Rungpore.
N. B.—For the districts in the 2nd para. the calculation is to be made for from May to October, inclusive, only.
Assam.—Sylhet, Kamroop, Nowgong, Luckhimpore.
N. B.—For Luckhimpore the calculation is to be made for from May to October, inclusive, only.

4th.—Where it appears advisable to the Magistrate of the District, he may authorize the appointment of such number of peons on the whole for all the Courts in his district as may suffice for executing the total number of processes of those Courts, and may from time to time apportion such peons according to need among such Courts.

5th.—When it appears to the District Magistrate that the number of processes issued out of any Court or Courts in the district has increased by 10 per cent., he shall be competent to make a corresponding increase in the number of peons, and if there shall be a diminution to the like extent, or if he should be satisfied that the processes of all or any of such Courts can be executed by a smaller number of peons, it shall be his duty to make a reduction accordingly.—*C. Os. No.* 13 *of* 2*nd April and No.* 35 *of* 17*th November* 1879. (*Wilkins*, p. 95.)

Certain processes not chargeable with fees.—No fee shall be chargeable for serving and executing any process, such as a notice, rule, summons or warrant of arrest, which may be issued by any Court of its own motion, solely for the purpose of taking cognizance of, and punishing any act done, or words spoken, in contempt of its authority.*—*Wilkins*, p. 96.

Process Fees in Madras.—The following rules have been passed by the Madras High Court under s. 20 of the Court Fees Act:—

On and after the 16th August 1873, all payments for the service of processes issued by the High Court in its Ordinary Appellate Jurisdiction and by the Civil and Revenue Courts subordinate to the High Court, and by Criminal Courts in the case of offences other than offences for which the police may arrest without warrant, shall be collected according to the rates fixed in Schedules A and B.

(Schedule A deals with Civil and Revenue Courts.)

Schedule B (*Criminal Courts*).	Rs.	A.	P.
1. Summons to defendant	0	8	0
And for every additional defendant, if applied for at the same time and if resident in the same neighbourhood ...	0	4	0
2. Summons to a witness	0	8	0
And for every additional witness, if applied for at the same time and if witness resides in the same neighbourhood...	0	4	6
3. Warrant of arrest	0	12	0
4. Notice, order, injunction or warrant not otherwise provided for	0	8	0

N. B.—(1) If a process is to be served or executed within a radius of six miles from the court-house, half the above rates only are to be charged. The Judge of every Court shall determine what villages are within the above radius, and a list of such villages shall be notified in a conspicuous place in the court-house.

(2) When a warrant remains unexecuted for fifteen days after its delivery to the officer entrusted with its execution, an additional fee at the same rate shall be levied from the party at whose instance the warrant was issued for every fifteen days or portion of fifteen days until return is made, provided that the delay in executing the first warrant is not attributable to the officer of the Court.—*Madras Gazette*, 1873, pp. 1255, 1256.

As to establishment for the service of criminal processes in Madras, see the rules of the Madras High Court under s. 22 of the Court Fees Act.—*Madras Gazette*, 1873, p. 1255.

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* This rule is Rule II of the Rules under cl. 1, s. 20, Court Fees Act, 1870, which otherwise apply only to civil processes.

Ch. VI s. 69 *Process Fees in Burma.*—The following fees for executing processes issued by the Criminal Courts in the case of offences other than offences for which Police-officers may arrest without a warrant are in force in Burma:—

Summons on witness	... ...	8 annas.
Summons on accused person, and any other notice, proclamation, or injunction not especially provided for	... ...	1 rupee.
Warrant of arrest	... ...	2 rupees.

The above fees must be paid by the complainant at whose instance the process is issued, and no further charge may be made on account of boat-hire or other expenditure.

Any Magistrate who has power to entertain cases on complaint preferred directly to himself has authority, on special grounds to be recorded in his proceedings, to remit the fee chargeable on any process issuing from his Court. No fee is chargeable upon any process issued by a Criminal Court of its own motion.—*Burma Gazette*, 1873, Part II, p. 198.

For rules as to the service of processes in Aden, see *Bombay Gazette*, 1877, p. 622.

The following rules as to service of summons on witnesses in Native States, natives of rank, and Revenue-officers are in force in Bombay:—

It having been brought to the notice of the High Court that serious delay in the disposal of criminal cases is frequently caused by the difficulty in obtaining the attendance of witnesses residing in Native States, the Court, in order to provide a remedy as far as in its power, is pleased to issue the following instructions for the guidance of Magistrates:—

I. In forwarding an application or summons for the attendance of a witness residing in a Native State, care should be taken to give such a description of him that he may be easily identified. Thus, for instance, besides the person's name and father's name, the requisition should indicate his age, caste, and village, and it should be mentioned if his village is in the neighbourhood of any well-known town.

II. The probable time during which the witness will be detained should also be stated; and, in fixing the date when the appearance of a witness is required, reasonable time should be given, so as to allow his being found and sent off.

III. When practicable, the batta allowed by Government orders for the expenses of witnesses should be transmitted at the time of sending the requisition.

IV. By these arrangements it is hoped that a greater degree of punctuality with regard to the attendance of witnesses from Native States will be secured; and the Court considers it desirable that officers should (when it is possible) avoid summoning such witnesses for the preliminary enquiry before the Magistrate, in those cases where their evidence, though necessary before the Session Court, is not indispensable for the purpose of commitment.

Batta to witnesses in criminal cases should be paid daily as it becomes due.

In the case of 1st and 2nd class Sirdars and other native gentlemen of high position, a letter signed by the Judge or Magistrate, and to the same effect as Form A, Sched. II, Criminal Procedure Code (cf. Sched. V, No. I, of this Act) may be substituted for the ordinary summons.

In summoning Revenue-officers of any description, due consideration shall be had to the loss and inconvenience the public service may suffer from the absence of those functionaries from their duties. When their evidence is required, they shall be detained for as short a period as possible, and their personal attendance shall be dispensed with whenever it can be consistently with the requirements of justice.—*Bombay Gazette*, 1879, pp. 471, 475.

Summons how served.

69. The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

A mere refusal to sign a receipt for a summons is not an offence under section 173 or section 180 of the Penal Code.
The Queen Empress v. Krishna Gobinda Das & others
I. L. R. 20 C. 358

71. Refusal to sign a receipt for a summons
I. L. R. 20 C. 358

Signature of receipt for summons.

Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

This and the succeeding sections embody, with verbal alterations, the provisions of s. 154 of Act X of 1872 and ss. 48 and 49 of Act IV of 1877.

As to service upon a servant of Government or of a Railway Company, see s. 72.

Whenever a summons to appear as a witness is issued upon an officer of police, it should be served upon such officer through the District Superintendent of Police, or the Assistant District Superintendent in charge of the outpost to which the individual summoned may belong.—*Smyth*, p. 90; see *Wilkins*, p. 106.

The mere showing to a witness of a summons is not sufficient service. Either the original should be left with the witness, or should be exhibited to him, and duplicate delivered or tendered; see *Reg.* v. *Kharsanlal Danatram*, 5 Bom. Cr. Ca., 20.

The refusal to give a receipt for a summons is not an offence under s. 173 of the Indian Penal Code.—*In re Bhoobuneshwar Dutt*, 2 C. L. R., 80; (S. C.) I. L. R., 3 Calc., 621, following *Queen* v. *Kolya bin Fakir*, 5 Bom. H. C. R., Cr. Cas., 34.

Service when person summoned cannot be found.

70. Where the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a Presidency-town, with his servant residing with him; and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

See note to preceding section.

The provision as to leaving the summons with a servant in the Presidency-towns is new.

Procedure when receipt cannot be obtained.

71. If the signature mentioned in sections 69 and 70 cannot, by the exercise of due diligence, be obtained, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

This section corresponds with s. 155 of Act X of 1872.

Returns of service of summons in what form to be made.—Attention should be paid to the following rules in making the returns of service of summons in criminal cases:—

(*a.*) *Personal service.*—When the summons is served personally, the service and the signature of the person served on the back of the summons or copy should be proved by the solemn declaration recorded in writing of the person who actually effected such service; and the identity of the person served with the party to whom the process is addressed should be proved by the affidavit or solemn declaration of some one personally acquainted with the person to be served.

(*b.*) *Service on an adult male member of the family.*—If the service be made on an adult male member of the family of such person residing with him, it should be proved by the solemn declaration of the officer effecting the service, and, if necessary, of some other person or persons acquainted with the facts that the defendant could not be found, and that the person to whom the process was

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delivered was an *adult* male member of his family, and was actually residing with him at the time of such service.

(*c.*) *Service by affixing copy of the summons to the house.*—If the service be made by affixing it to the dwelling-house of the person to be served, it should, in like manner, be proved that such person could not be found, nor any other person on whom service could be made, and that the person to be served *was ordinarily residing* in the house, on the outer door of which a copy of the process was fixed, at the time when it was so fixed.—*Cal. H. C. C. O. No.* 9 *of* 6*th April* 1871.

Service on servant of Government or of Railway Company.

72. Where the person summoned is in the active service of the Government or of a Railway Company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court with the endorsement required by that section.

Compare Act X of 1872, s. 158, proviso. That section empowered the Court to send the summons for service to the head of the office in which the person summoned was employed. Now this course is to be ordinarily pursued, and moreover the head of the office is to return the summons with the endorsement required by s. 69.

Service of summons upon persons in the employment of Government.

(*a.*) Whenever a summons to appear as a witness in a criminal case is issued against an officer of police, it shall be served upon such officer through the Superintendent of the District, or the Assistant in charge of the Subdivision to which such officer may belong.—*Calc. H. C. C. O., No.* 14 *of* 6*th December* 1866.

(*b.*) All summons on Medical Subordinates at subdivisions must be served through the Magistrate or other executive head of the district, in order to enable him, in communication with the Civil Surgeon, to make arrangements for the conduct of their medical duties during their absence.—*Calc. H. C. C. O. No.* 1 *of* 10*th January* 1868.

(*c.*) Whenever it may be necessary to summon an officer or soldier in military employ to attend a Civil or Criminal Court as a witness, the process-server, who is to serve the summons, must be instructed to take it under cover to the officer in command of the regiment or detachment with which the witness may be serving, and to apply for his assistance in serving it. With this assistance, the process-server shall then proceed to serve the process, and shall make his return direct to the Court. In such cases sufficient time should always be given to admit of arrangements being made for the relief of the witness summoned.—*Calc. H. C. C. O. No.* 24 *of* 24*th June* 1878.

(*d.*) When Jail or other Departmental Officers of Government, who reside in the station, are summoned as witnesses, arrangements should be made to send for them only when actually wanted.—*Calc. H. C. C. O. No.* 8 *of* 22*nd August* 1878. See *Wilkins*, pp. 106-7.

This rule may conveniently be extended to all cases in which it may be necessary to serve a summons on an accused person or a witness in the service of any public department.—*Smyth*, p. 90.

Service of summons outside local limits.

73. When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served.

Compare Act XXIII of 1840, s. 1, Execution of Process Act, and Act IV of 1877, s. 50.

74. When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved. Ch. VI ss. 74-75

Proof of service in such cases, and when serving officer not present.

The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

Compare Act IV of 1877, s. 51. The last part of the section is new.

B.—Warrant of Arrest.

75. Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or, in the case of a Bench of Magistrates, by any member of such Bench; and shall bear the seal of the Court.

Form of warrant of arrest.

Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

Continuance of warrant of arrest.

Compare Act X of 1872, s. 159, and Act IV of 1877, s. 56, which did not require the seal. It is not necessary under this section, as it was under s. 159 of Act X of 1872, that the warrant should be sealed by the Magistrate; it is sufficient if it bears the seal of the Court. For form of warrant of arrest, see Sched. V, Form 2.

'Writing' and 'written' are defined in s. 4, cl. (*e*).

Fees.—As to fees for warrant and other processes, see note to s. 68, *ante*, p. 40.

No general warrants for arrest should ever be issued by a Court of Justice. See *Re Hastings*, 9 Bom. H. C. R., 154, *per* SARGENT, J.

Every warrant should state, as shortly as possible, the special matter on which it proceeds. Every warrant is to be in the Form B given in the second schedule (see Sched. V, No. 2, of this Code), or to the like effect. A strict adherance to the form of warrants of arrest prescribed by the Code will tend to prevent their being granted irregularly and without inquiry as to whether the circumstances justify their issue.—*Smyth*, pp. 91, 92.

Great care should be taken to have the forms of warrants distinguished from forms of summonses, and to make the police know the difference. And great care should also be taken that a warrant, which always implies personal arrest and restraint, never goes forth when a summons to attend would be sufficient for the ends of justice, and any attempt to coerce or restrain a party who has been summoned only should be checked and punished. The police are to carry out to the letter the instructions issued in the writ handed over to them; the responsibility for the consequences of an informal or illegal process, bearing the seal and signature of the Magistrate, rests with him.—*Smyth*, p. 92.

Warrants of commitment issued by European Magistrates should, as a rule, and certainly in all cases where more than six months' imprisonment is awarded, be filled

Ch. VI s. 76 up in English; and warrants for the release or remission of sentences of prisoners confined in jail should be in English, and signed at full length by the officer issuing the order. In these warrants the prisoner's name, father's name, his residence, caste, and term of sentence should be invariably stated.—*Symth*, p. 93.

The warrant must be signed in full by the Judge or Magistrate who issues it with his own hand; a signature affixed by means of a stamp is not sufficient.—*Smyth*, p. 93; *Subramanya Ayyar* v. *Queen*, I. L. R., 6 Mad., 396. So in Bengal the High Court, at the request of the Bengal Government, has recently issued a circular, reminding all Judicial Officers that in case of all documents which are required by law to be *issued*, the impression of a stamp bearing the officer's name is insufficient and illegal.—*C. O. No.* 8 *of* 15*th August* 1882; *Wilkins*, p. 119.

Before a warrant can issue, evidence must be given that an offence has been committed, and a punishable offence must be stated in the warrant.—*In re S. M. Bedhumukhi Debi*, 6 B. L. R., Appx., 129. See remarks of PHEAR, J., in *In re Surendro Nath Roy*, 13 W. R., Cr., 27; (S. C.) 5 B. L. R., 274.

In the case of *Re Hastings*, 9 Bom. H. C. R., 154, the warrant authorized the committal of James Hastings without giving any description whatever as to what James Hastings was indicated thereby. It was held, that the warrant was bad. SARGENT, J., after referring to *Hood's case*, 1 Mood. Cr. Ca., 281, in which the omission of the christian name of the person to be apprehended was held to vitiate the warrant, said: "I think I am bound to follow the principle involved in that ruling, which is, that a warrant should contain distinct and unequivocal intimation to the person that he is the individual meant to be apprehended and must surrender to the officers; and this too, the more especially, as the form of warrant prescribed by the Code requires that his residence should be inserted. The issuing of general warrants is, it is well known, illegal, and this, though not, properly speaking, a general warrant, which means a warrant to apprehend all persons committing a particular offence or class of offences, is however of such a general nature as to justify the police in arresting any person of the name of James Hastings, whoever he may be, or wherever he may be found, the number of persons to be arrested under it being limited only by the limit to the number of persons bearing that name. The warrant in this case is, in my opinion, far more general than was the warrant in *Hood's case*, and I am therefore of opinion that it is bad."

The provisons of this section apply to every summons or warrant issued under the Code—S. 93, *post*.

Court may direct security to be taken.

76. Any Court issuing a warrant for the arrest of any person may, in its discretion, direct by endorsement on the warrant that, if such person execute a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

The endorsement shall state (*a*) the number of sureties, (*b*) the amount in which they and the person for whose arrest the warrant is issued are to be respectively bound, and (*c*) the time at which he is to attend before the Court.

Recognizance to be forwarded.

Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.

Compare s. 160 of Act X of 1872 and s. 58 of Act IV of 1877. The words "and thereafter until otherwise ordered by the Court" are new.

As to deposit of money or Government securities in lieu of a bond, see s. 513, *post*.

77. A warrant of arrest shall ordinarily be directed to one or more Police-officers, and, when issued by a Presidency Magistrate, shall always be so directed; but any other Court issuing such a warrant may, if its immediate execution is necessary and no Police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

Warrants to whom directed.

When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more, of them.

Warrant to several persons.

The first paragraph of this section corresponds with s. 161 of Act X of 1872 and s. 56 of Act IV of 1877. The last paragraph, with s. 164 of Act X of 1872 and s. 59 of Act IV of 1877.

Warrants should be directed to the senior officer of police in attendance at a Court, by whom they should be registered in a book kept for that purpose. That officer should then endorse the name of the officer who is to be charged with its execution (generally an officer in charge of a Police-station) upon each warrant, and despatch it to him without delay. The officer receiving the warrant may again transfer it for execution to another Police-officer (see s. 79), and in every such case a regular endorsement of the process must take place so that the name of the officer executing the process may be apparent on the order itself.—*Bengal Police Manual*, p. 396, 2nd Edition.

A warrant ought not to be issued to an unofficial person, except when the Magistrate is without the assistance of competent Police-officers, and unless the urgency is imminent.—*In re Surendra Nath Roy*, 5 B. L. R., 274; (S. C.) 13 W. R., Cr., 27.

In cantonments, the Commanding Officer of the Cantonment may send any process requiring service or execution by any means not immediately at his disposal to the chief Police-officer in the Cantonment for service or execution through the Cantonment-police; and the said chief Police-officer shall serve or execute such process in the same manner as if it had been issued by Cantonment Magistrate, and subject to the same rules.—*Cantonments Act, III of* 1880, *s.* 11.

78. A District Magistrate or Subdivisional Magistrate may direct a warrant to any landholder, farmer or manager of land within his District or Subdivision for the arrest of any escaped convict, proclaimed offender, or person who has been accused of a non-bailable offence, and who has eluded pursuit.

Warrant may be directed to landholders, &c.

Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued is in, or enters on, his land or farm, or the land under his charge.

When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest Police-officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76.

Act X of 1872, s. 162.

The powers given by this section could only, under the former Code, be

exercised by the Magistrate of a district. Now Subdivisional Magistrates may direct warrants to landholders for the purposes mentioned in the section.

A landholder required under this section to execute the warrant, neglecting to do so would be punishable under s. 187 of the Penal Code.

79. A warrant directed to any Police-officer may also be executed by any other Police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

Warrant directed to Police-officer.

This corresponds with s. 165 of Act X of 1872 and s. 60 of Act IV of 1877.

As to when persons are bound to assist Magistrates and Police, see s. 42 and note to s. 43.

80. The Police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

Notification of substance of warrant.

Act X of 1872, s. 176. Compare s. 56, *supra*, and see note to s. 46, *supra*.

Under s. 81, the person arrested must be brought before the Court without unnecessary delay. Wrongful confinement is punishable under s. 342 of the Penal Code. That section is as follows: "whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

Having regard to the definition of wrongful confinement, it would appear that, except in cases which might come under s. 79 of the Penal Code, a Police-officer who without a warrant arrested a person charged with a non-cognizable offence, would bring himself within the terms of s. 342 of the Penal Code, the detention being illegal. In the case of *Reg.* v. *Budrool Hossein*, 24 W. R., Cr., 51, a Sub-Inspector, in consequence of something which took place on making inquiries, detained a person who came to make a complaint, and after a short interval, during which he consulted his superior officer, discharged him on his recognizance. The person detained prosecuted the Sub-Inspector for wrongful confinement under s. 342 of the Penal Code. The High Court (L. J. JACKSON and McDONELL, JJ.) held, that although there was probably excessive and mistaken exercise of powers not civilly excusable in a Police-officer, the facts did not amount to the criminal offence of wrongful restraint, as there was no malice or intention of doing an act of the nature spoken of in ss. 339 and 340 of the Penal Code, and no voluntary obstruction or restraint. The report does not show the circumstances under which the detention took place, but a slight reference to ss. 339, 340, and 342 of the Penal Code will satisfy to show that the question of malice or intention has nothing to do with the constitution of the offence of wrongful confinement, however much it may affect the question of the amount of punishment to be inflicted. See *Suprosunno Ghosal*, 2 Wym., Cr. Rul., 78; (S. C.) 6 W. R., Cr., 88. See also the case of *Bussoram Dass*, 19 W. R., Cr., 36. Detention by a Police-officer for over 24 hours is punishable under s. 29 of Act V of 1861 as a wilful breach of the rule laid down by s. 167, *post* (see *Bussoram Dass*, 19 W. R., Cr., 36), unless the detention is not continuous.—*Indroba Thaba*, 1 W. R., Cr., 31. See notes to s. 167, *post*.

A Police-officer should not attempt to arrest a person without having the warrant in his possession, so as to be able to show the warrant if necessary—*Empress* v. *Amar Nath*, I. L. R., 5 All., 318, or, without having it endorsed, if it was not originally directed to him—See note to s. 46, *supra*, and also the last paragraph of s. 84, *infra*. If a person, on being arrested, object that there is a mistake, and that he is not the person named in the warrant, the officer should release him, unless he believes in good faith he was the person (Penal Code, s. 79). If he so believe, he should proceed with the arrest, and the person arrested will have no right of private defence (Penal Code, s. 99). If the person

against whom the warrant was issued, or whom the officer executing the warrant believed in good faith to be that person, resist, the officer may use all means necessary to effect the arrest.

Section 79 of the Penal Code declares that nothing is any offence which is done by a person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it. Accordingly, if a Police-officer arrest a person, having *bonâ fide* mistaken him for another, whom he is authorized under the warrant to arrest, or if, without having a warrant, he arrests a person *bonâ fide* believing that a cognizable offence has been committed, when in fact no such offence has been committed, he will be protected.

By Expl. II to s. 99 of the Indian Penal Code, a person is not deprived of the right of private defence against an act done or attempted to be done by the direction of a public servant, unless he knows or has reason to believe that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority if demanded.

In the case of *Codd* v. *Cabe* (45 L. J., Mag. Ca., 101; L. R., 1 Exch. Div., 352; 34 L. J., 453; 13 Cox, C. C., 202), a warrant had been issued, addressed to all Police-officers of Devon, for the arrest of C for trespass in pursuit of conies. It was held that C was justified in resisting a constable who attempted to arrest him without having the warrant in his possession, although it was not shown that the production of the warrant was required by C. The case was appealed, and it was held that a person against whom a warrant has been issued for an offence less than felony (all Police-officers being empowered to arrest without warrant in case of felony), cannot be arrested by a constable who has not the warrant in his possession at the time of the arrest.

Person arrested to be brought before Court without delay.

81. The Police-officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security), without unnecessary delay, bring the person arrested before the Court before which he is required by law to produce such person.

Act X of 1872, s. 183. Compare s. 60, *supra*. Warrants issued against railway servants shall be entrusted for execution to some Police-officer of superior grade, who shall, if he find on proceeding to execute the warrant that the immediate arrest of the railway servant would occasion risk and inconvenience, make all arrangements necessary to prevent escape, and apply to the proper quarter to have the accused relieved, deferring arrest until he is relieved. (Government of India, Home Department Resolution No. 206-3, dated Simla, the 20th June 1877, circulated with Government of Bengal Circular No. 40, dated 3rd July 1877.)—*Bengal Police Manual*, p. 399, 2nd Edition. See s. 72, *ante*.

Where warrant may be executed.

82. A warrant of arrest may be executed at any place in British India.

Act X of 1872, s. 167, and Act IV of 1877, s. 63.

Warrant forwarded to Magistrate for execution outside jurisdiction.

83. When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a Police-officer, forward the same by post or otherwise to any Magistrate or Commissioner of Police within the local limits of whose jurisdiction it is to be executed.

Ch. VI ss. 84-85

The Magistrate or Commissioner to whom such warrant is so forwarded shall endorse his name thereon, and, if practicable, cause it to be executed within the local limits of his jurisdiction.

This and the following section embody the provisions of s. 168, paras. 1 and 2, and the first part of s. 170 of Act X of 1872. See also Act IV of 1877, ss 64, 65.

As to officers who were empowered in Bombay to act under s. 168 of Act X of 1872, see *Bombay Gazette*, 1873, p. 439.

Under Sched. III, any Magistrate of the third class has power to endorse a warrant.

As to manner of effecting arrest of an accused escaping to Aden, see Punjab Rec., 1883, Police Department, p. 133.

Language to be used in Warrant of Arrest.—Warrants of arrest issuing out of a Magistrate's Court should be written " in the language in ordinary use in the district in which it is held,"—that is to say (with certain exceptions), the language in which the proceedings of the several Courts are conducted. But where a warrant is sent for execution to the Magistrate of a district where a different language is in ordinary use, the warrant should be accompanied by a translation, certified by the transmitting Magistrate to be correct, into such other language, or into English. Moreover, in such cases it would be proper that the warrant should always be accompanied by a letter in English requesting its execution.—*Calc. H.C. C. O. No.* 3 *of 25th July* 1872; *Wilkins*, p. 107.

Warrant directed to Police-officer for execution outside jurisdiction.

84. When a warrant directed to a Police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a Police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed.

Such Magistrate or Police-officer shall endorse his name thereon, and such endorsement shall be sufficient authority to the Police-officer to whom the warrant is directed to execute the same within such limits, and the local police shall, if so required, assist such officer in executing such warrant.

Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or Police-officer within the local limits of whose jurisdiction the warrant is to be executed will prevent such execution, the Police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it.

This section applies to the police in the towns of Calcutta and Bombay.

See note to preceding section.

Procedure on arrest of person against whom warrant issued.

85. When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest, or is nearer than the Magistrate or Com-

missioner of Police within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 76, be taken before such Magistrate or Commissioner. Ch. VI ss. 86-87

Compare Act X of 1872, s. 169, and Act IV of 1877, s. 65, para. 2. The provision for taking the person arrested before Commissioner of Police is new.

Procedure by Magistrate before whom person arrested is brought.

86. Such Magistrate or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court: Provided that if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate or Commissioner, or a direction has been endorsed under section 76 on the warrant, and such person is ready and willing to give the security required by such direction, the Magistrate or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

Nothing in this section shall be deemed to prevent a Police-officer from taking security under section 76.

Compare Act X of 1872, s. 170, and Act IV of 1877, s. 65, para. 2.
The Commissioner of Police has now the power to admit the person arrested to bail. The provision as to a direction being endorsed on the warrant is new.
For form of bail-bond after arrest under a warrant, see Sched. V, Form 3.

C.—Proclamation and Attachment.

Proclamation for person absconding.

87. If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself, so that such warrant cannot be executed, such Court may publish a written proclamation, requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

The proclamation shall be published as follows:—

(*a*) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(*b*) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides, or to some conspicuous place of such town or village; and

(*c*) a copy thereof shall be affixed to some conspicuous part of the court-house.

A statement by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, shall be conclusive evidence that the requirements of this

Cr. VI s. 88 section have been complied with, and that the proclamation was published on such day.

Section 171 of Act X of 1872 provided for the publication of a proclamation requiring a person accused of an offence not coming within s. 148 to appear and answer the complaint; and s. 353, para. 1, provided for a proclamation requiring the attendance of a witness. The provisions of this section are substantially the same as those of the sections mentioned above. See also Act X of 1875, s. 82, and Act IV of 1877, ss. 67, 137. The last clause as to the day of publication is new. The words 'from the date of publishing such proclamation' in the first paragraph clear up a doubt as to the commencement of the period for the appearance of a person absconding; see *In re Ramkishore Sein*, 10 B. L. R., App., 14, 19; (S. C.) 19 W. R., Cr., 12.

Under the former Code, a proclamation could not be issued in summons cases,—that is to say, cases punishable with a fine only or with imprisonment for a period not exceeding six months, or with both. Now a proclamation may be published for the appearance of any person against whom a warrant has been issued.

For forms of proclamation requiring the attendance of persons accused and of witnesses, see Sched. V, Forms 4 and 5.

Fees.—As to fees for attachments and other processes, see *ante*, note to s. 68.

The fee for a proclamation for an absconding party is Rs. 2; for the proclamation for a witness not attending, annas 8. The Court may order a defaulting witness to pay the cost of the proclamation.—*Calc. H. C. C., 2nd April*, 1879, *and 17th November*, 1879; *Wilkins*, p. 89.

Any Magistrate has power to issue proclamations in cases judicially before him.—*Schedule III-i, cl.* (3).

See ss. 172 and 174 of the Indian Penal Code as to the punishment for absconding to avoid service of a summons, order or other proceedings issued by a public servant, and as to non-attendance in obedience to a summons, notice, order or proclamation issued by a public servant. It will be observed that s. 172 of the Penal Code does not refer to a warrant, which is addressed not to the person to be arrested, but to the Police-officer or other person. It has been held that a warrant, not being a "summons, notice or order," does not come within that section, and accordingly that the offence of absconding by an offender against whom a warrant has been issued is not punishable under the section.—*Queen* v. *Omesh Chunder Ghose*, 1 Wym., Cr., 61; (S. C.) 5 W. R., Cr., 71, and Mad. H. C. Ruling, 21st April 1866; *Weir*, 33; *Reg.* v. *Amu Jan*, 7 N. W. P., 302. Section 172 applies to a witness.—*Hossein Manjee*, 9 W. R., Cr., 70. See ss. 188 to 190 of the Penal Code. The proper course, in case of disobedience to a warrant, is to proceed under this and next succeeding sections.

If a person having concealed himself before process issues continues to do so, he absconds.—*Srinavasa Ayyangar* v. *Queen*, I. L. R., 4 Mad., 393. See judgment of TURNER, C.J., as to the meaning of the term "abscond."

88. The Court may, after issuing a proclamation under section 87, order the attachment of any property, moveable or immoveable, or both, belonging to the proclaimed person.

Attachment of property of person absconding.

Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorize the attachment of any property belonging to such person without such district, when endorsed by the District Magistrate *or Chief Presidency Magistrate* [Act X of 1886, s. 4] within whose district such property is situate.

If the property ordered to be attached be debts or other moveable property, the attachment under this section shall be made— CH. VI s. 88

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

If the property ordered to be attached be immoveable, the attachment under this section shall, in the case of land paying revenue to Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(e) by taking possession; or

(f) by the appointment of a receiver; or

(g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or

(h) by all or any two of such methods, as the Court thinks fit.

The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a Receiver appointed under Chapter XXXVI of the Code of Civil Procedure.

If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government; but it shall not be sold until the expiration of six months from the date of the attachment, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

The first two paragraphs of this section embody the provisions contained in paras. 1 and 2 of s. 172, and paras. 2 and 3 of s. 353 of Act X of 1872. The provisions as to the attachment of debts and other moveable property are new, as are the provisions as to the appointment, powers, and duties of a Receiver. Compare the last clause of s. 525, *infra*, as to the sale of perishable property. See also Act IV of 1877, ss. 68, 137.

Fees.—The fee for a warrant of attachment in Bengal and Assam is Re. 1. Where it is necessary to place officers in charge of property attached, 4 annas per diem is chargeable for each officer so employed.—*Calc. H. C. C. O.*, *2nd April and 17th November*, 1879; *Wilkins*, p. 89. See further note to s. 68.

It will be noticed that, before proceeding under this section, a proclamation must have been issued; see the case of *Shewdyal Singh* v. *Griban Singh*, 6 W. R., Cr., 73, where it was decided that, before the passing of an order declaring the property of an accused person, who cannot be found, to be at the disposal of the Govern-

Ch. VI s. 89 ment, there must be a proclamation specifying the time within which such person is required to appear, and that before a Magistrate can issue such a proclamation, he must be satisfied that such person has absconded or is concealing himself for the purpose of avoiding the service of the warrant.

A Magistrate has no power to order the attachment of any property unless it belongs to the party absconding, and he should be most careful not to interfere with or disturb the possession of third persons. But when claimants have held back for six months, a Magistrate would probably be considered to be perfectly justified in presuming that the property was not theirs, and in leaving them to vindicate any right they might have in a civil suit. He may fairly say that he is not bound to try a question which is more properly one for a Civil Court.—*Reg.* v. *Chumroo Roy*, 7 W. R., Cr., 35; see also *In re Chunder Bhon Singh*, 17 W. R., Cr., 10.

The claims of third persons to property attached under these sections cannot be investigated by the Magistrate.—*Reg.* v. *Chumroo Roy*, 3 Wym., Cr. Rul., 20; (S. C.) 7 W. R., Cr., 35; *Empress* v. *Sheodihal Roy*, I. L. R., 6 All., 487. A person whose property has been attached ought to be permitted to show cause against the confiscation of his goods.—*In re Jhundoo Singh*, 5 W. R., Cr., 8. The declaration of forfeiture directed to be made was, PHEAR, J., thought, in a case under s. 184 of Act XXV of 1861 (s. 88 of this Code), intended to be in furtherance of a matter of procedure, not simply as a mode of punishment for contempt of process. "In this view," his Lordship said, "I think that, if it is not made before the person affected by the proclamation has come in, or has been brought in, it ought not to be made at all. Because by that time its purpose has been effected, though even possibly by other means than that of the process which was evaded."—*In re Ram Kishore Sein*, 10 B. L. R., Appx., 18; (S. C.) 19 W. R., 12.

In the case of *Golam Ahed* v. *Toolseeram Bera*, I. L. R., 9 Calc., 861; (S. C.) 12 C. L. R., 441, the Court, PRINSEP and O'KINEALY, JJ., held, that after the date of an atttachment under this section and during its continuance, no title could be conferred by an attachment and sale subsequently made in execution of a money-decree.

For forms of order of attachment and warrants of attachment to compel appearance under this section, see Sched. V, Form 6.

The following rule is in force in Bengal as to the sale of revenue-paying land attached by a Magistrate upon the absconding of an accused person:—

The Board of Revenue have, at the instance of the Court, issued the following instructions (*vide* Board's C. O. No. 9 of July 1878) to Collectors in connection with the attachment and sale, under s. 88 of the Criminal Procedure Code, of land paying revenue to Government:

"The High Court have represented that Collectors of districts, who hold sales of land paying revenue to Government from time to time, could more conveniently and advantageously hold sales of such attached land as is above referred to, situated within their jurisdictions, than could Magistrates, especially in cases where the Magistrate is in another district. The Board therefore direct that Collectors will, in future, comply with the requisitions of Magistrates to hold sales in such cases; and it is further directed that, in these cases, the procedure in respect of advertisement, sale, and delivery of possession, in the case of sales in execution of decrees of Civil Courts under Act XIV of 1882 (The Code of Civil Procedure), may be strictly followed."—*C. O. No. 7 of 17th August* 1878; *Wilkins*, p. 107.

Proceedings under this section are not judicial proceedings.—*Empress* v. *Sheodihal Roy*, I. L. R., 6 All., 487.

Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, is punishable under s. 176 of the Indian Penal Code. See s. 45, *supra*, and *In re Pandya Nayak*, I. L. R., 7 Mad., 436.

Restoration of attached property.

89. If, within two years from the date of the attachment, any person whose property is or has been at the disposal of Government under the last paragraph of section 88 appears voluntarily or is apprehended and brought before the Court by whose order the

property was attached, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the net proceeds of the sale, or if part only thereof has been sold, the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

This section consolidates the provisions of ss. 173 and 354 of Act X of 1872, s. 83 of Act X of 1875, and ss. 69 and 138 of Act IV of 1877.

As to appeal, see s. 405, *infra*.

Any Magistrate has power to restore property attached under this section.—*Schedule III-i, cl.* (5).

When a person against whom a proclamation has been issued comes in, he should be asked whether he had really absconded and concealed himself, so that he may explain his absence.—*Shewdyal Singh* v. *Girban Singh*, 6 W. R., Cr., 73 ; and see *Re Bishonath Sircar*, 3 W. R., Cr., 63.

A Magistrate has no power to order the attachment of any property unless it belongs to the party absconding, and he should be most careful not to interfere with or disturb the possession of third persons. But when claimants have held back for six months, a Magistrate would probably be considered to be perfectly justified in presuming that the property was not theirs, and in leaving them to vindicate any right they might have in a civil suit. He may fairly say that he is not bound to try a question which is more properly one for a Civil Court.—*Reg.* v. *Chumroo Roy*, 3 Wym., Cr. Rul., 20 ; (S. C.) 7 W. R., Cr., 35 ; see also *In re Chunder Bhon Singh*, 17 W. R., Cr., 10. See further note to preceding section.

Where property which has become at the disposal of Government, no title can be conferred after the date and during the continuance of the attachment by an attachment and sale subsequently held in execution of a decree.—*Golam Abed* v. *Toolseram Bera*, I. L. R., 9 Calc., 861 ; (S. C.) 12 C. L. R., Cr., 11.

D.—Other rules regarding processes.

90. A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

Issue of warrant in lieu of or in addition to summons.

(*a*) if, either before the issue of such summons, or after the issue of the same, but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons ; or

(*b*) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith, and no reasonable excuse is offered for such failure.

Section 148, para. 2, and ss. 150 and 156 of Act X of 1872 contained provisions for the issue of a warrant against an accused person ; and ss. 352 and 355, provisions for the issue of a warrant against a witness. Section 494 provided for the arrest of a person summoned to show cause why he should not be bound over to keep

Ch. VI secs. 91-93 the peace. Similiar provisions were contained in Act X of 1875, ss. 81, 84, and Act IV of 1877, ss. 34, 36, 53, 135, 136, and 217.

For form of warrant, see Sched. V, No. 7.

A Magistrate ought only to issue a warrant for the apprehension of a witness when he sees reason to believe that a witness will not attend to give evidence unless he is compelled to do so.—*In re Mohesh Chunder Banerjee*, 4 B. L. R., App., 1. Due service of the summons in such a case must be proved (*In re Abdoor Ruhman*, 7 W. R, Cr., 37); and the Court must be satisfied that the summons has been or will be disobeyed (*Reg.* v. *Sutherland*, 14 W. R., Cr., 20) before issuing a warrant of arrest.

The section does not authorize the committal of a witness. Witnesses therefore brought up under a warrant of arrest should not be treated as criminals, but should be dealt with simply as persons arrested on civil process.—*Calc. H. C. C. O. No.* 21, 22*nd November*, 1864; *Wilkins*, p. 107.

The forms of warrants prescribed by the Code should be strictly adhered to.—*Calc. H. C. C. O. No.* 21, 22*nd November*, 1864.

Care should be taken that a warrant, which always implies personal arrest and restraint, never goes forth when a summons to attend would be sufficient for the ends of justice; and any attempt to coerce or restrain a party who has been summoned only should be checked and punished.—*Smyth*, p. 93.

Absconding to avoid service of a summons, notice, or order proceeding from a public servant is punishable under s. 172 of the Indian Penal Code, and non-attendance in obedience to summons, notice, order, or proclamation under s. 174 of the same Code. As to what is absconding, see judgment of TURNER, C.J., in *Srinavasa Ayyangar* v. *Queen*, I. L. R., 4 Mad., 393, p. 397. When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by s. 69 or s. 70) by the person to whom it was delivered or tendered, or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.—S. 74, *supra*. The affidavit mentioned may be attached to the duplicate of the summons and returned to the Court.—S. 74, *supra*.

Power to take bond for appearance.

91. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant is present in such Court, such officer may require such person to execute a bond with or without sureties for his appearance in such Court.

Compare Act IV of 1877, s. 140.

Arrest on breach of bond for appearance.

92. When any person who is bound by any bond taken under this Code to appear before a Court does not so appear, the officer presiding in such Court may issue a warrant, directing that such person be arrested and produced before him.

Compare Act X of 1872, s. 208, para. 2, and Act IV of 1877, s. 124, para. 2, which provided for the arrest of an accused person failing to appear on the day to which a hearing was adjourned.

Provisions in this chapter generally applicable to summonses and warrants of arrest.

93. The provisions contained in this chapter relating to a summons and warrant and their issue, service and execution shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

Compare Act X of 1872, s. 158, para. 1, and s. 185, and Act IV of 1877, s. 52.

Summons to Jurors and Assessors under s. 326 must apparently be served under this chapter.

Language to be used in Warrant of Arrest.—Warrants of arrest issuing out of a Magistrate's Court should be written "in the language in ordinary use in the district in which it is held,"—that is to say (with certain exceptions), the language in which the proceedings of the several Courts are conducted. But where a warrant is sent for execution to the Magistrate of a district where a different language is in ordinary use, the warrant should be accompanied by a translation, certified by the transmitting Magistrate to be correct, into such other language or into English. Moreover, in such cases it would be proper that the warrant should always be accompanied by a letter in English requesting its execution.—*Calc. H. C. C. O. No. 3 of 25th July* 1872, *Wilkins*, p. 107.

CHAPTER VII.

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVEABLE PROPERTY AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED.

A.—Summons to produce.

Summons to produce document or other thing.

94. Whenever any Court, or, in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a Police-station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he cause such document or thing to be produced instead of attending personally to produce the same.

Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, post-card, telegram or other document in the custody of the Postal or Telegraph authorities.

The first paragraph of this section embodies the provisions of s. 365 of Act X of 1872, s. 86 of Act X of 1875, and s. 144 of Act IV of 1877. The second paragraph contains a provision similar to that of Act X of 1877, s. 164. The last paragraph is new.

It should be remembered that a person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.—*Evidence Act, I of* 1872, *ss.* 139.

Ch. VII secs. 95-96.

The sections of the Evidence Act referred to in the last clause are as follows :—

Section 123.—No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Section 124.—No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure.

A Magistrate requiring the production in evidence of documents recorded in a Court of Justice or in the custody of any public officer, should, in his communication to such Court or officer, state clearly whether he requires the entire record or any particular paper or papers; also at what time and place the papers, if not previously sent by post, must be produced; and whether any subordinate officer will be required to attend for the purpose of proving them. The communication should be signed and sealed in the same way as a summons. As a rule, it is not desirable that a Magistrate should send for original papers in cases in which copies will serve the purpose, and in which the person requiring the production of the papers is in a position to obtain certified copies.—*Bom. H. C. Cir. No. 45, Gazette,* 1879, pp. 471—475.

Procedure as to letters and telegrams.

95. If any document in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities, as the case may be, to deliver such document to such person as such Magistrate or Court directs.

If any such document is, in the opinion of any other Magistrate, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for and to detain such document pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

Compare the provisions of Act X of 1872, s. 369, and Act IV of 1877, s. 146. The power of requiring the Telegraph Department to deliver up documents is new.

The only Magistrate in Presidency-towns who can require the delivery of documents from Postal or Telegraph authorities is the Chief Magistrate.

B.—Search-warrants.

When search-warrant may be issued.

96. Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, paragraph one, has been or might be addressed, will not or would not produce the document or other thing as required by such summons or requisition,

or where such document or other thing is not known to the Court to be in the possession of any person,

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant; and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained.

Nothing herein contained shall authorize any Magistrate, other than a District Magistrate or Chief Presidency Magistrate, to grant a warrant to search for a document in the custody of the Postal or Telegraph authorities.

As to the first paragraph of this section, compare Act X of 1872, s. 366, Act X of 1875, s. 87, and Act IV of 1877, s. 145. The second paragraph corresponds with the last clause of para. 1 of s. 368 of Act X of 1872; see also Act IV of 1877, s. 159; and the last paragraph, with s. 369, cl. 1, of Act X of 1872.

If any Magistrate, not being empowered by law, issues a search-warrant for a letter in the Post Office, or telegram in the Telegraph Department, his proceedings are void.—See s. 530 (*b*), *infra*.

It is essential to the legality of a search-warrant that the production of some specified or distinct thing or object which may be deemed essential to the inquiry and to the conviction of the accused is desired. The Magistrate alone is to determine whether the production of the particular thing is essential.—*Reg.* v. *Syud Hossein Ali Chowdhry*, 8 W. R., Cr., 74.

The provisions of ss. 43, 75, 77, 79, 82, 83, and 84 shall, so far as may be, apply to all search-warrants issued under s. 96, s. 98 or s. 100.—S. 101, *post.* The provisions in these sections relate to the execution of warrants of arrest.

A search-warrant should, except under special circumstances, be executed between sunrise and sunset. If, for special reasons, a search-warrant be executed between sunset and sunrise, such reasons must be reported to the District Superintendent for the information of the Magistrate having jurisdiction.—*Bengal Police Manual*, 2nd Ed., p. 402.

Power to restrict warrant.

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

This corresponds with the last paragraph of s. 368 of Act X of 1872.
For form of warrant, see Sched. V, No. 8.

Search of house suspected to contain stolen property, forged documents, &c.

98. If a District Magistrate, Subdivisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged documents, false seals, or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging, or that any forged documents, false seals or counterfeit

Ch. VII s. 99 stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging, are kept or deposited in any place,

he may by his warrant authorize any Police-officer above the rank of a constable—

(*a*) to enter, with such assistance as may be required, such place, and

(*b*) to search the same in manner specified in the warrant, and

(*c*) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials as aforesaid, and

(*d*) to convey such property, documents, seals, stamps, coins, instruments or materials before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and

(*e*) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale, or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments or materials, knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified, or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging.

Compare Act X of 1872, s. 377, and Act IV of 1877, s. 160.

Clauses (*d*) and (*e*) are new. See s. 101, which applies, ss. 43, 75, 77, 79, 82, 83, and 84, so far as may be, to search-warrants issued under this section.

Disposal of things found in search beyond jurisdiction.

99. When, in the execution of a search-warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and, unless there be good cause to the contrary, such Magistrate shall make an order authorizing them to be taken to such Court.

Compare Act X of 1872, s. 373, para. 2, and s. 374.

C.—Discovery of Persons wrongfully confined.

Ch. VII secs. 100-103

100. If any Presidency Magistrate, Magistrate of the first class or Subdivisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined, and such search shall be made in accordance therewith, and the person if found shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

Search for persons wrongfully confined.

This section is new. No such power as is given by it is supposed to have existed in India, except in the Presidency-towns, where the High Courts formerly issued under Act X of 1875 directions in the nature of a *habeas corpus*. See s. 491, *post*, for the powers which the High Courts at Calcutta, Madras, and Bombay now have to issue directions of the nature of *habeas corpus*. As to what amounts to wrongful confinement, see ss. 339 and 340 of the Indian Penal Code.

D.—General Provisions relating to Searches.

101. The provisions of sections 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to all search-warrants issued under section 96, section 98 or section 100.

Direction, &c., of search-warrants.

The provisions in the sections referred to relate to the execution of warrants of arrest. Compare Act X of 1872, ss. 370, 371, 372, 373 (para. 1), 375, and 376, and Act IV of 1877, s. 161.

102. Whenever any place liable to search or inspection under this chapter is closed, any person residing in, or being in charge of, such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Persons in charge of closed place to allow search.

If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48.

The first paragraph of this section corresponds with s. 382 of Act X of 1872; see also s. 162 of Act IV of 1877. The last clause gives the officer making the search the powers conferred by Act X of 1872, ss. 383, 384, and Act IV of 1877, ss. 163, 164.

103. Before making a search under this chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search.

Search to be made in presence of witnesses.

Ch. VII secs. 104-105

The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

Occupant of place searched may attend.

The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

This section corresponds substantially with Act X of 1872, s. 385, and Act IV of 1877, s. 165. The provision as to making a list is new.

The search-warrant should, except under special circumstances, be executed between sunset and sunrise.—*Bengal Police Manual*, 2nd Edition, p. 402. In Bengal, the following directions have been circulated for the guidance of Police-officers acting under this section. The sending for shopkeepers, selected arbitrarily by the police, and making them witnesses to the search of the houses of accused persons, is a fruitful source of oppression and extortion. It is difficult to prescribe rules for the selection of witnesses to the search of houses for stolen property, but District Superintendents can easily ascertain by questioning the witnesses sent in whether they have been unfairly selected. One respectable householder should not be summoned a second time till his neighbours have had their turns, unless good reason be given for their exemption. Respectable shopkeepers are just as liable to be summoned as other respectable inhabitants of the place.—*Bengal Police Manual*, 2nd Ed., p. 403. As to other searches by the police, see ss. 165 and 166, *post*, and the notes thereto.

Power to impound document, &c., produced.

104. Any Court may, if it thinks fit, impound any document or other thing produced before it under this Code.

Section 367 of Act X of 1872 gave the Court power to impound any document produced before it; see also Act X of 1875, s. 88. This section, it will be seen, goes further and empowers the Court to impound any 'other thing' produced before it.

Magistrate may direct search in his presence.

105. Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

Act X of 1872, s. 378, para. 2; Act IV of 1877, s. 147.
As to search-warrants, see ss. 96—99, *ante*, p. 58.

§106. Procedure to be followed by magistrate trying a case when he is not empowered to bind accused [illegible] § 106 Cr. P. C.

Mahmud [illegible] v. [illegible] Shaikh [illegible] 21 [illegible] C. 622

PART IV.

PREVENTION OF OFFENCES.

CHAPTER VIII.

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

A.—Security for keeping the Peace on Conviction.

Security for keeping the peace on conviction

106. Whenever any person accused of rioting, assault or other breach of the peace, or of abetting the same, or of assembling armed men or taking other unlawful measures with the evident intention of committing the same, or any person accused of committing criminal intimidation by threatening injury to person or property, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Subdivisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

This section corresponds with s. 489, para. 1, and s. 490, cl. 1, of Act X of 1872; with ss. 140 and 141 of Act X of 1875; and with ss. 208 and 209 of Act IV of 1877.

For form of bond to keep the peace, see Sched. V, No. 10.

The clause as to "any person accused of committing criminal intimidation by threatening injury to person or property" is new, but it must be borne in mind that it is not in all cases where a person is convicted of criminal intimidation under s. 503, but only where the intimidation is by threatening injury to person or property that the Court on conviction may require a bond to be executed. The clause has apparently been inserted in the present Code in consequence of the decision in the case of *Empress* v. *Rughubar*, I. L. R., 2 All., F. B., 351, where the words in s. 489 of Act X of 1872—"taking other unlawful measures with the evident intention of committing" a breach of the peace—were held not to include the offence of intimidation by threatening to bring false charges.

The last clause of the section, which is also new, is in accordance with the case of *Queen* v. *Ghisa*, N. W. P., 1875, p. 875.

Under the three former Acts, the period for which a bond might be ordered to be given was a period not exceeding one year in case of an order passed by a Magistrate, and three years in case of an order passed by a High Court or a Court of Session.

Ch. VIII s. 106 The section applies only in cases of conviction of persons accused of the offences mentioned. See *Reg.* v. *Hur Kumari Dassia*, 24 W. R., Cr., 10. But the order of a Magistrate, who convicted the accused of criminal trespass, directing him, on the expiration of his sentence, to execute personal recognizances to keep the peace, was upheld as legal and necessary, as the acts of the accused seemed to show an intention of committing a breach of the peace.—*Queen* v. *Gendoo Khan*, 7 W. R., 14. See *Re Jhapoo*, 20 W. R., 37. So that when the accused is acquitted, it is not competent to the Court to call upon him to give security.—*Mad. H. C.*, 19*th May*, 1874 ; *Weir*, p. 24.

In the case of *Umda Khanum*, 3 C. L. R., 72, a Joint Magistrate tried certain persons on a charge of riot and assault, but having "grave doubts as to their guilt," discharged them, but at the same time and without taking any evidence required one of those persons as well as the witness of the complainant and others who appeared for the complainant to give security to keep the peace. The High Court, in setting aside the order as illegal, made the following remarks: "A Magistrate must have a report or information which appears to be credible and which he believes before he can issue a summons calling upon any person to show cause why he should not be bound over to keep the peace, but he cannot bind over a person until he has adjudicated on evidence before him, that is, upon evidence taken in the regular way in the presence of the person who is bound over . . . . If, however, any person has been convicted of an offence attended with violence of the nature specified in s. 491 (s. 106 of the present Code), the Magistrate is competent, in addition to the sentence or order passed, to direct that the person so convicted shall give security. In such a case, too, the Magistrate has convicted on evidence before him (that is the person concerned), that facts are established requiring security because he has convicted such person of a breach of the peace or an intention to commit a breach of the peace." See *Run Bahadoor Sing* v. *Ranee Tilessuree Kooer*, 22 W. R., Cr., 79.

In the case of *Empress* v. *Kanta Prasad*, I. L. R., 4 All., 212, the Full Bench held, that a Magistrate when exercising the powers of an Appellate Court is competent to make an order requiring the appellant to furnish security for keeping the peace, under the corresponding section of Act X of 1872. This section, however, is precise as to the order being made at the time of passing sentence. If no such order is then made, subsequent proceedings under this chapter must be taken under s. 107, and the parties summoned to show cause.—*Re Gobind Sooboodhee*, 15 W. R., Cr., 56 ; *Empress* v. *Rahim Bakhsh*, Punjab Rec., 1883, p. 8 ; *Queen* v. *Powell*, 3 N. W. P., 96. See *Jan Mahammed* v. *Empress*, Punjab Rec., 1884, p. 38.

If any person in respect of whom an order requiring security is made under this section is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence. In other cases such period shall commence on the date of such order.—S. 120, *post.* See s. 349, *post.*

No order for security can be made under the section where there is only a possible apprehension of a future breach of the peace.—*Reg.* v. *Abdul Huq*, 20 W. R., Cr., 57. Where such breach appears to the Court to be likely, proceedings may be taken under s. 107. See *Queen* v. *Hur Kumari Dassia*, 24 W. R., Cr., 10.

Under s. 15, *supra*, except as otherwise provided by any order of the Local Government (see s. 16), a Bench of Magistrates, any one of whom is a Magistrate of the first class, shall be, deemed to be, for the purposes of this Code, a Magistrate of that class, and as such would probably be held to have jurisdiction to make an order under this section. See *Queen* v. *Bebbeki Pathak*, 21 W. R., Cr., 12 ; and *In re Baroda Prosunno Chuckerbutty*, 2 C. L. R., 348.

Under s. 513, *infra*, a deposit of money or Government promissory notes may, except in the case of a bond for good behaviour, be taken in lieu of a bond.

Section 123, *infra*, provides for the imprisonment of the accused on default in finding securities under this section.

Fees.—In exercise of the powers conferred by s. 35 of the Court Fees Act (VII of 1870), the Governor-General in Council was pleased to remit, in the whole of British India, the fees chargeable on security-bonds for keeping the peace, or for good behaviour of persons other than the executants.—*Gazette of India*, 1880, p. 223.

Jurisdiction of Magistrate – In a case where an accused [illegible] the [illegible] of the [illegible] the [illegible] which the accused was temporarily residing at the time when the Magistrate [illegible] [illegible]

Held, that [illegible] permanently [illegible]

Sh[illegible]

[illegible] 10 [illegible] 129.

B.—Security for keeping the Peace in other Cases and Security for Good Behaviour.

Ch. VIII s. 107

107. Whenever a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class receives information that any person is likely to commit a breach of the peace, or to do any wrongful act that may probably occasion a breach of the peace, within the local limits of such Magistrate's jurisdiction, or that there is within such limits a person who is likely to commit a breach of the peace, or do any wrongful act as aforesaid in any place beyond such limits, the Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

Security for keeping the peace in other cases.

This section corresponds with s. 491, and the last para. of s. 502, of Act X of 1872, and with ss. 215 and 231 of Act IV of 1877.

The provisions, however, of s. 502, last para., of Act X of 1872, that proceedings could be taken in any district where the person it is desired to bind may be, is omitted. The jurisdiction, therefore, of the Courts has been somewhat narrowed.

If any Magistrate, not being empowered in that behalf, demands security to keep the peace, his proceedings are void.—*Section 530 (c), infra.*

A Magistrate, it was held by a Full Bench at Allahabad, has no power under this section to issue process to a person not residing within his district.—*In re Jai Prakash Lal*, I. L. R., 6 All. (F. B.), 26. So in Calcutta it was held that this section does not empower a Magistrate to issue process on persons not residing within the limits of his district.—*In re Rajendro Chundra Roy Chowdhry*, I. L. R., 11 Calc., 737; *In re Charoo Chundra Mullick*, 10 C. L. R., 430. The proper course for a Magistrate to pursue, where he believes that certain persons who are resident beyond the limits of his district are likely to commit a breach of the peace, is to cause information of the fact to be given to the Magistrate within whose district such persons reside, so that proceedings may be taken against them by a Court which has jurisdiction.—*In re Rajendra Chundra Roy Chowdhry*, I. L. R., 11 Calc., 737. The Court in *In re Dinno Nath Mullick*, I. L. R., 12 Calc., 133, followed the last case and *In re Jai Prakash Lal*, I. L. R., 6 All. (F. B.), 26. The latter was a case in which a Magistrate of the Ghazipur District, on having received a police report that the servants of the Maharajah of Dumraon, in the Shahabad District, were preparing to sow certain land in the Ghazipur District—an act which would likely cause a breach of the peace—issued a summons calling on the Dewan of the Maharajah to show cause why he should not execute a bond to keep the peace.

The word 'wrongful' has been inserted, apparently, in consequence of the case of *Kashi Chunder Dass* v. *Hur Kishore Dass*, 19 W. R., Cr., 47; (S. C.) 10 B. L. R., 441, where the words "do any act that may probably occasion a breach of the peace," which occurred in s. 491 of Act X of 1872, were held to mean a wrongful act, and not one which a person may lawfully do. Thus, a Magistrate cannot prevent a person from building a house adjoining that of another, on the ground that the droppings from the roof of the house, if completed, will fall upon the adjoining house, and be likely to cause a breach of the peace.—*Ibid.* See *Ram Kumar Banerjee* v. *Rajah Gopal Sing Deb*, 17 W. R., Cr., 54, where it was held illegal to take recognizances from one person to prevent another committing a breach of

Ch VIII s. 107 the peace. A non-resident zemindar cannot be bound over to keep the peace because his local agents are committing acts likely to cause a breach of the peace.—*In re Charoo Chunder Mullick*, 10 C. L. R., 430.

Now, by s. 112, when a Magistrate acting under this section deems it necessary to require any person to show cause, he must make an order in writing setting forth the substance of the information received and other particulars as to the bond to be executed. If that person is not in Court and a summons or warrant has therefore to be issued under s. 114, *post*, a copy of the order made under s. 112 must be served with the summons or warrant.

Under s. 117, *infra*, the Magistrate must inquire into the truth of the information upon which he has acted. If he does not find that a person is himself likely to commit a breach of the peace, he cannot order him to furnish security and hold him, by anticipation, responsible for the result of resistance to acts which are not shown to be illegal or likely to induce a breach of the peace.—*In re Sheo Surn Lall*, 3 C. L. R., 280. See *In re Kashi Chunder Dass*, 10 B. L. R., 441 ; (S. C.) 19 W. R., 47.

According to Expl. I to s. 491 of Act X of 1872, a summons to show cause might be issued upon " any report or other information which appears credible, and which the Magistrate believes ; " and it was held, that a petition which was declared by the police to be false, and was unsupported by any complaint or solemn affirmation, did not come within these words so as to warrant a Magistrate demanding security to keep the peace.—*Chamaro Malo* v. *Kashi Chunder Lalla*, 8 W. R., Cr., 85. Conversations out of Court with persons however respectable are not legal or proper materials upon which Magistrates should adopt proceedings under this section or s. 110.—*Empress* v. *Babua*, I. L. R., 6 All., 132. In that case a Magistrate acted " to a great extent upon information which had reached him from trustworthy sources as to the reputed character and habits " of the accused. In his order he stated: " Not one but nearly every respectable city resident who has spoken to me on the subject has condemned this Babua (accused) as by repute the biggest black character in the city, and to such an extent has his influence made itself felt for evil, that one and all my informants refuse to come forward and give evidence against the accused for fear of consequences." The Magistrate's order binding over the accused, which was confirmed by the Sessions Judge, was set aside by the High Court.

A statement that the complainant expected that the defendant might at any time make an attempt on his person or property, if believed in, is sufficient information for the Court to take proceedings upon.—*Reg.* v. *Kristendro Roy*, 7 W. R., Cr., 30.

Information of the kind mentioned in s. 107 must be of a clear and definite kind directly affecting the person against whom process is issued, and it should disclose tangible facts and details, so that it may afford notice to such person of what he is to come prepared to meet.—*In re Jai Prakash Lal*, I. L. R., 6 All. (F. B.), 26, p. 30, *per* STRAIGHT, Offg. C.J. See *Empress* v. *Nathu*, I. L. R., 6 All., 214.

The report of a Police-officer (*In re Bindrabun Shaha*, 10 W. R., Cr., 41) and the report of a Subordinate Magistrate (*Ex parte Nellikel Edalthil Achen*, 2 Mad. H. C. R., 240 ; *Reg.* v. *Jivanji Limji*, 6 Bom. H. C. R., Cr., 1) have been held to be sufficient information upon which a Magistrate might issue a summons. But the act, of which information is given and in respect of which security to keep the peace is required, must be an act which is shown to be in contemplation at the time of the information given, and not merely one the repetition of which may be expected or apprehended from past misconduct of the kind without anything further.—*Mad. H. C. Pro.*, *29th August*, 1876 ; *Weir*, p. 37. See *In re Sheo Surn Lall*, 3 C. L. R., 280. But although the reports of a Police-officer or of a Subordinate Magistrate are sufficient information upon which a Magistrate may issue a summons, it need hardly be pointed out they are not evidence upon which he can determine, under s. 117, whether it is necessary to take a bond to keep the peace or for good behaviour. See *Reg.* v. *Jivanji Limji*, 6 Bom. H. C. R., Cr., 1 ; and *Reg.* v. *Dalpatram Pemabhai*, 5 Bom. H. C. R., Cr., 105.

Where a witness for the defence, in a case of rioting, admitted being present at or near the scene of the riot, and denied that the accused took part in it, the Magistrate, finding the accused guilty and without any further proceedings, called

upon both the accused and his witness to enter into bonds to keep the peace for a year: It was held that his procedure was illegal as far as the witness was concerned.—*Queen* v. *Kadar Khan*, I. L. R., 5 Mad., 380.

Ch. VIII secs. 108-109

A District Magistrate has power under s. 528, *post*, to withdraw a case falling under this section.—*In re Divendra Nath Shanial*, I. L. R., 8 Calc., 851.

Where a Magistrate bound down 26 persons to keep the peace after recording evidence as to 11 of them only, the order was set aside by the High Court as to the persons not affected by the evidence.—*In re Kassim Biswas*, 10 C. L. R., 335.

Under the Code of 1861 it was held, that it should appear, on the face of the order of the Magistrate, that he had received credible information that there was a likelihood of a breach of the peace.—*In re Birreshuree Pershad*, 6 W. R., Cr., 93.

It is not necessary to call witnesses in support of an information laid before a Magistrate previous to issuing a summons to show cause under this section.—*In re Mullick Fukeerun*, 11 W. R., Cr., 6.

The provisions of s. 350, *post*, apply to an inquiry under this section.—See note to that section, *post*.

Procedure of Magistrate, &c., not empowered to act under section 107.

108. When any Magistrate not empowered to proceed under section 107, or a Court of Session or High Court, has reason to believe that any person is likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by detaining such person in custody, such Magistrate or Court may issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case under section 107.

A Magistrate before whom a person is sent under this section may, in his discretion, detain such person in custody until the completion of the inquiry hereinafter prescribed.

See the proviso to s. 494 of Act X of 1872.

Under the previous sections of this chapter, the Magistrates empowered to act are Presidency Magistrates, District Magistrates, Subdivisional Magistrates, and Magistrates of the first class.

If any Magistrate, not being empowered on that behalf, demands security to keep the peace, his proceedings are void.—*S.* 530 (*c*), *infra*.

Security for good behaviour from vagrants and suspected persons.

109. Whenever a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class receives information—

(*a*) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing an offence, or

(*b*) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for

Ch. VIII s. 110 such period not exceeding six months as the Magistrate thinks fit to fix.

This section corresponds with paras. 1 and 4 of s. 504, and para. 2 of s. 515, of Act X of 1872, and with ss. 212 and 213 of Act IV of 1877.

For form of bond for good behaviour under this section, see Sched. V, No. 11.

Clause (*a*) seems to deal with what was termed under the Code of 1872 'lurking within the jurisdiction.'

See ss. 55, 56, *ante*, pp. 43, 45, as to powers of police to arrest under the circumstances referred to in this section.

Separate proceedings should be taken against each person ordered to find security, unless it is clear that there was such a connection between the parties as indicates the necessity of a contrary course.—*Mad. H. C. Pro.*, 17*th March* 1863; *Weir*, p. 36. See *Empress* v. *Nathu*, I. L. R., 6 All., 214.

Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary that the accused should be given an opportunity of entering into his defence, and that he should be clearly informed of the accusation which he has to meet.—*Empress* v. *Ishwar Chundra Sur*, I. L. R., 11 Calc., 13.

After the expiration of the term of confinement in default of security, a second security cannot be demanded except upon some new proof of bad livelihood.—*In re Juswunt Singh*, 6 W. R., Cr., 18.

If any Magistrate, not being empowered in that behalf, demands security for good behaviour, his proceedings are void.—*S.* 530 (*d*), *infra*.

110. Whenever a Presidency Magistrate, District Magistrate, *or* Subdivisional Magistrate, or *a* Magistrate of the first class, specially empowered in this behalf by the Local Government, receives information that any person within the local limits of his jurisdiction is an habitual robber, house-breaker or thief, or an habitual receiver of stolen property, knowing the same to have been stolen, or that he habitually commits extortion, or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury,

Security for good behaviour from habitual offenders.

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period not exceeding three years as the Magistrate thinks fit to fix.

This section, to some extent, corresponds with ss. 505 and 506 of Act X of 1872, and ss. 213, 214, and 231 of Act IV of 1877. The words in italics have been inserted by s. 5 of Act X of 1886.

For form of bond for good behaviour under this section, see Sched. V, No. 10.

Unlike the corresponding sections of the former Acts, this section omits power to require security from persons "of notoriously bad livelihood or of a dangerous character," or "of a character so desperate and dangerous as to render their release without security hazardous to the community." It also loses sight of the distinction drawn in ss. 505 and 506 of Act X of 1872 between men who are robbers, etc., by repute, and men who are proved to be habitual robbers, etc.

Where the only information set forth in the order refers to an apprehended breach of the peace, the Magistrate has no authority whatever to resort to this section.—*Empress* v. *Babua*, I. L. R., 6 All., 132. He must proceed under s. 107. Under that section security can only be taken for one year. Under this section it can be taken for three years.

110. Security for good behaviour - Transfer. Proceedings under section [illegible] cannot be transferred to any Court outside the district within which such proceedings have been lawfully instituted.
In the matter of the petition of Amarsing.
I. L. R. 16 All 9

Security for good behaviour - [illegible] - transfer of the case. [illegible]

Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary that the accused should be given an opportunity of entering into his defence, and that he should be clearly informed of the accusation which he has to meet.—*Empress* v. *Ishwar Chunder Sur*, I. L. R., 11 Calc., 13. Ch. VIII s. 110

The object of this chapter, it is to be borne in mind, is the prevention, not the punishment, of crime. It is solely for the purpose of securing good behaviour, and any attempt to use it for the punishing of past offences is wrong and not sanctioned by law.—*In re Umbica Proshad*, 1 C. L. R., 268, *per* Macpherson and Birch, JJ. When a charge of a specific offence is under trial, proceedings under this chapter should not be taken.—*Ib.; In re Juggut Chunder Chuckerbutty*, I. L. R., 2 Calc., 110., *Pro.*, 4 Mad. H. C. R., Appx., 441; *In re Pedda Siva Reddi*, I. L. R., 3 Mad., 238. The mere fact that a person from whom security is required has been previously convicted of offences against property is not sufficient to justify proceedings under this section (110), unless there be additional evidence that the person complained against has done some act or resumed avocations indicating on his part an intention to return to his former course of life.—*In re Haidar Ali*, I. L. R., 12 Calc., 520. There the High Court remarked (p. 524): "In this case, the person from whom security was required had only recently been released from jail, and we think it was rather the duty of the police to assist him in finding honest employment than to apply to have him incarcerated for a further period merely on the ground of his previous convictions." See also *In re Raja Valad Hussein Saheb*, I. L. R., 10 Bom., 174; *Empress* v. *Murli*, Punj. Rec., 1885, p. 89.

In *In re Pedda Siva Reddi*, I. L. R., 3 Mad., 238, the Court (Turner, C. J., and Muthusami Ayyar, J.) said: "The power given by the 505th section (s. 110 of this Code) is one which should always be exercised with nice discretion by the Magistracy, but its exercise is not to be confined to cases in which positive evidence is forthcoming of the commission of crime by the persons against whom it is sought to enforce the law. The power is a *preventive* and not *punitive* power." Although when witnesses are examined as to *general character*, their testimony is not of much *value* as to the habits of a suspected person, unless they can, in support of their opinion, adduce instances of the misconduct imputed, when the question is only as to repute, the evidence of witnesses, if reliable, is not without value, though they may not be able to connect the suspected person with the actual commission of the crime.—*Ib.*

In proceedings under this section it has been held that conversations out of Court with persons however respectable are not legal or proper material to act upon. See the remarks of Straight, J., in *Empress* v. *Babua*, I. L. R., 6 All., 132, p. 136. The information to be required in proceedings for taking security for good behaviour by a Magistrate before issuing an order under s. 112 may be, to some extent, of a hearsay and general description; but when the party to whom the order is directed appears in Court in obedience to such order, the inquiry must be conducted on the lines laid down by s. 117. It is not because a man has a bad character that he is therefore necessarily liable to be called upon for sureties of the peace or for good behaviour. There must be satisfactory evidence in the one case that he has done something, or taken some step, that indicates an intention to break the peace, or that he is likely to occasion a breach of the peace; and in the other, that he is within the category of persons mentioned in this section (110), the determination of which question must always be guided by the considerations pointed out in *Empress* v. *Nawab*, I. L. R., 2 All., 835.—*Ib.*

Amount of security.—The amount of security to be furnished should be such as to afford the person a fair chance of complying with the order, so as not to make the alternative of imprisonment unavoidable.—*Empress* v. *Dedar Sircar*, I. L. R., 2 Calc., 384; (S.C.) 1 C. L. R., 95. The Magistrate should consider the station in life of the person concerned, and should not go beyond a sum for which there is a fair probability of his being able to find security. The imprisonment in default is provided as a protection to society against the perpetration of crime by the individual, not as a punishment for a crime committed; and being made conditional on default of finding security, it is only reasonable and just that the individual should be afforded a fair chance at least of complying with the required condition of security.—*Mad. H. C. Pro.*, 26*th April*, 1869, 4 Mad. H. C. R., Appx., 46; and see *Re Nilmadhub Ghosal*, 19 W. R., Cr., 1.

Ch. VIII s. 111 When the amount of security is *primâ facie* unreasonable, the High Court can call upon the Magistrate to certify the grounds upon which he fixed it.—*Empress* v. *Dedar Sircar*, I. L. R., 2 Calc., 384; (S.C.) 1 C. L. R., 95.

Security of Rs. 20,000, in four sureties of Rs. 5,000 each, for one year, or in default imprisonment for the same period, the first two months simply, and the remaining ten months rigorously (*In re Umbica Proshad*, 1 C. L. R., 268), and a recognizance of Rs. 10,C00 with two sureties for Rs. 5,000 each (*In re Juggut Chunder Chuckerbutty*, I. L. R., 2 Calc., 110) were held to be unreasonable.

In the case of *The Empress* v. *Kala Chand Dass*, 6 C. L. R., 128; (S.C.) I. L. R., 6 Calc., 14, each of seven accused persons were ordered to find two sureties to the amount of Rs. 500 each; three of them to deposit in cash Rs. 1,000 each; two of them Rs. 500 each; and the remaining two Rs. 250; and in default to have rigorous imprisonment for one year. PONTIFEX and MCDONELL, JJ., held, that it was illegal to require deposits in cash instead of bonds, and that the order as to sureties was prohibitive. PONTIFEX, J., observed:—"With respect to the sureties, it (the order) is prohibitive, for it is scarcely likely that fourteen sureties in Rs. 500 each would be forthcoming in a place like Bhaokalty. My own experience in Calcutta has shown me, that respectable people in Calcutta, who have to provide sureties upon grants of letters of administration, have to pay heavy sums for the sureties; and I can only suppose that it would be greatly more expensive for reputed *budmashes* to provide sureties for good behaviour. So that it comes to this, that the requirement of two sureties to the amount of Rs. 500 each, for each of the defendants, will, in effect, be inflicting a heavy fine upon them in a case only of suspicion and reputation."

In making an order for security to keep the peace, a Magistrate has no right to enforce an arbitrary condition not essential for the object in view,—namely, to restrain a party from the infringement of the law; still less has he a right to impose impossible conditions.—*In re Narain Soobodhee*, 22 W. R., Cr., 37.

After the expiration of the term of confinement in default of security, a second security cannot be demanded except upon some new proof of bad livelihood.—*In re Juswunt Singh*, 6 W. R., Cr., 18.

Where an accused person was convicted of theft and sentenced to two years' rigorous imprisonment, and was further ordered to enter into his own recognizance for Rs. 50, and find two sureties each for a like sum, for his good behaviour for one year after the term of his imprisonment had expired, and in default to suffer rigorous imprisonment for one month,—it was held that the latter part of the order was bad.—*Tamiz Mandal* v. *Umid Karigar*, I. L. R., 9 Calc, 215. See remarks of SPANKIE, J., in *Empress* v. *Partab*, I. L. R., 1 All., 666.

Separate proceedings should be taken against each person ordered to find security, unless it is clear that there was such a connection between the parties as indicates the necessity of a contrary course.—*Mad. H. C. Pro.*, 17th *March* 1863; *Weir*, p. 36. See *Empress* v. *Nathu*, I. L. R., 6 All., 214.

The order must specify a definite period for which the security is required.—*Mad. H. C. Pro.*, 8*th April*, 1876; *Weir*, p. 36; *In re Pedda Siva Reddi*, I. L. R., 3 Mad., 238.

Proviso as to European vagrants.

111. The provisions of sections 109 and 110 do not apply to European British subjects in cases where they may be dealt with under the European Vagrancy Act, 1874.

Under s. 517 of Act X of 1872, the provisions generally of the corresponding chapter of that Act were made not to apply to European British subjects.

European subjects may be dealt with under this chapter in cases not coming within the European Vagrancy Act, IX of 1874.

By s. 5 of that Act, the Magistrate or Justice of the Peace shall, in case of an apparent vagrant, or in any other case when a person apparently a vagrant comes before him, make a summary inquiry into the circumstances and character of the apparent vagrant, and if he is satisfied that such person is a vagrant, he shall record in his office a declaration to that effect.

(1.) If he is further of opinion that the vagrant is not likely to obtain employment at once, or if he has reason to believe that a declaration of vagrancy has on any former occasion been recorded in respect of such vagrant, he shall require the vagrant to go to a Government workhouse, and shall draw up an order to that effect. Ch. VIII s. 112

(2.) The vagrant shall then be placed in charge of the police for the purpose of being forwarded to the workhouse, and the said order shall be a sufficient authority to the police for retaining him in their charge while he is on his way to the workhouse, and to the governor of the workhouse for receiving and detaining such vagrant.

When the officer making the inquiry mentioned in s. 5 is of opinion that the vagrant is likely to obtain employment in any place subject to the Local Government, or (when the vagrant is in any part of the dominions mentioned in s. 1) in any place subject to any adjacent Local Government, such officer may, in his discretion, forward the vagrant to such place in charge of the police, and draw up an order to that effect. Such order shall be a sufficient authority to the police for retaining the vagrant in their charge while he is on his way to such place of employment.—*Act IX of* 1874, *s.* 6.

Upon his arrival at the place of employment, the vagrant shall be taken before the nearest Magistrate of Police or Justice of the Peace exercising powers as aforesaid, to whom the order for transmission shall be delivered. Such officer shall thereupon, to the best of his ability, assist the vagrant in seeking employment, and may, in the meantime, if he think fit, keep the vagrant in the charge of the police. Should the vagrant fail to obtain suitable employment within a reasonable time, not exceeding fifteen days from such arrival, such officer shall forward him to a Government workhouse in the manner provided by s. 5.—*Act IX of* 1874, *s.* 7.

"Vagrant" means a person of European extraction (see s. 3 of the Act) found asking for alms or wandering about without any employment or visible means of subsistence.—*Act IX of* 1874, *s.* 3.

112. When a Magistrate acting under section 107, section 109 or section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

Order to be made.

This section corresponds with ss. 492, 509 (para. 1), and 515 (para. 1) of Act X of 1872, and with ss. 216 (para. 1) and 222 of Act IV of 1877.

Under the previous Acts, the circumstances to which this section refers were to be set out in the summons, except where the person, to whom otherwise a summons would have been issued, was in Court. Under this Act, unless such person is in Court (s. 113), a summons or warrant must be issued (s. 114), accompanied by the order made.

Character and class of sureties.—Where an order was made by a Magistrate requiring that the accused should give two sureties, being "persons of respectability and substance not related to him and residing within one mile of his house," and it appeared that there was no person of respectability within a mile of the house of the accused, the High Court expunged the conditions prescribed as being arbitrary.—*In re Narain Sooboddhee*, 22 W. R., Cr., 37.

The provision directing the Magistrate to specify in his order the *character and class* of the sureties required, enables the Magistrate, for example, to require landholders as sureties, and in such case to refuse to accept pleaders or bunyas as sureties.

The direction that the order should set out the substance of the information is very important, and ought to be carefully complied with, though the omission to comply with it would not be sufficient to justify the High Court in quashing the

Ch. VIII s. 112 proceedings, unless the petitioner had been prejudiced.—See *Koonjbehary Chowdhry* v. *Eknath Gurain*, 15 W. R., Cr., 43; s. 537, *infra*; *Abasu Begum* v. *Umda Khanum*, I. L. R., 8 Calc., 724; *Reg.* v. *Gunga Singh*, 20 W. R., Cr., 36.

In the case of *The Empress* v. *Nathu*, I. L. R., 6 All., 214, a Magistrate ordered 69 persons to show cause why they should not give security to keep the peace. The order purported to be made under s. 112, the ground of the order being thus stated:—"From reports made by the Police and the Tahsildar, it seems that there is danger of a breach of the public peace by the persons mentioned below, because a rival sect is opposed to the celebration of the Rathjattra-Mela." After an enquiry as against all the accused jointly, the Magistrate, on the evidence of the Tahsildar and a Sub-Inspector of Police, ordered that 10 of the accused, who were said to be ringleaders, should enter into bonds with sureties, and the rest should enter into their own recognizances to keep the peace for one year. On reference to the High Court, STRAIGHT, J., set the order aside, because (1) the order did not adequately or properly disclose the substance of the report or information upon which the summons was issued; (2) that the statements of the Tahsildar and Sub-Inspector as to the majority of the persons summoned were too loose to justify a wholesale order for security; (3) that the *mela* only lasting for a fortnight, it was an excessive exercise of power to require all the parties to give security for a year; (4) that there should have been clear and distinct evidence affecting each of the defendants warranting an inference that they were likely to commit a breach of the peace or to do a wrongful act likely to occasion a breach of the peace. STRAIGHT, J., said:—"Putting aside for a moment the obvious inconvenience, to use the mildest term, of dealing with 69 different persons in one proceeding, his (the Magistrate's) order, as purporting to be prepared under s. 112 of the Criminal Procedure Code, does not adequately or properly disclose the substance of the report or information upon which his summons issued. Parties against whom process is issued . . . . are entitled to something more than a mere assertion in writing by the Magistrate that he has been informed that a breach of the peace is likely to occur, in order to enable them, if they are in a position to do so, to bring evidence to rebut the truth of such information . . . . The provisions of the Code of Criminal Procedure as to finding security for the peace may be easily converted into an engine of injustice and oppression, and this Court is bound to watch over proceedings adopted thereunder with the closest scrutiny. . . . . . . I do not wish to say a word more than is absolutely necessary, as I am aware that the Magistrate has an exceedingly difficult district to deal with; and I should be sorry in any way to weaken his legitimate authority or action. But the Criminal Procedure Code must not be made use of for the purpose of supplying administrative deficiencies in the shape of an inadequate police force to keep a place in order." See *In re Kassim Biswas*, 10 C. L. R., 335, where 26 persons were bound over to keep the peace by a Magistrate who recorded evidence against 11 only.

Where a witness for the defence in a case of rioting stated that he was at or near the scene of the riot, the Magistrate, without any further proceedings, ordered him to enter into a bond to keep the peace. The order was set aside as illegal.—*In re Kadar Khan*, I. L. R., 5 Mad., 380.

No order should be made for security until the person called on has had an opportunity to defend himself.—*Empress* v. *Ishwar Chundra Sur*, I. L. R., 11 Calc., 13.

When a Magistrate has called upon persons to show cause why they should not be bound down in their own recognizances to keep the peace, he cannot go beyond the requisition, and on the adjudication of the matter order them to furnish other securities besides.—*In re Abdool Bari*, 25 W. R., Cr., 50; *Ram Kissore Acharjee Chowdhry* v. *Arip Khan*, 21 W. R., Cr. 6. See s. 118, *infra*.

In the case of *Anundee Kooer* v. *Sooneet Kooer*, 10 W. R., Cr., 40, it was held, under the Criminal Procedure Code of 1861, that a Magistrate had power to cancel an order summoning a person to show cause why he should not enter into a bond to keep the peace. See ss. 125, 126, and 530 (*f*) as to cancelling a bond taken under this chapter.

Amount of bond—See note to s. 110.

113. If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.

Procedure in respect of person present in Court.

This section corresponds generally with the explanation to s. 492 of Act X of 1872, and para. 2 of s. 216 of Act IV of 1877.

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is to bring him, before the Court:

Summons or warrant in case of person not so present.

Provided that, whenever it appears to such Magistrate, upon the report of a Police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

See ss. 494 and 515 (para. 1) of Act X of 1872, and s. 217 (proviso) of Act IV of 1877.

For form of summons on information of a probable breach of the peace, see Sched. V, No. 12.

Under the former Acts, X of 1872 and IV of 1877, the procedure was slightly different. The Magistrate issued a summons, setting forth the particulars referred to in s. 112 (see Act X of 1877, ss. 491, 492); and if the person summoned did not attend, a warrant might then be issued for his arrest (s. 494, para. iv); provided that a warrant might, as under the proviso to this section in certain circumstances, be issued at once.

Under this Act the Magistrate must make an order in writing under s. 112, and this order must accompany every summons or warrant issued under s. 114.

Under the proviso to s. 217 of Act IV of 1877, the substance of the report or information was directed to be recorded in the warrant. Here it would seem to be sufficient for the Magistrate to record a proceeding, setting forth the substance of the report or other information.

In ordering the arrest of a person under this section, the Magistrate must act on recorded information; it is not enough for him to express a belief that such a course is necessary. Not only must he have "reason to fear the commission of a breach of the peace," but that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person. See *Empress* v. *Babua*, I. L. R., 6 All., 132, p. 138.

The words "there is reason to fear the commission of a breach of the peace" seem to limit the Magistrate's power to cases under s. 107.

115. Every summons or warrant issued under section 114 shall be accompanied by a copy of the order made under section 112, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

Copy of order under section 112 to accompany summons or warrant.

This section is new.

Ch. VIII ss. 116-117

Power to dispense with personal attendance.

116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.

See s. 495 of Act X of 1872 and s. 218 of Act IV of 1877.

'Pleader' includes advocate, a vakil or an attorney of a High Court, and any muktar or other person appointed with the permission of the Court to act in the proceedings; see definition, s. 4, cl. (*n*), *supra*, p. 6.

The former Acts were more specific, giving the Magistrate power to permit the person informed against to appear and enter into the required security or recognizance, or to show cause against such requisition by an agent duly authorized to act in his behalf.

See *In re Dinonath Mullick*, I. L. R., 12 Calc., 133, as to circumstances under which a Magistrate ought to allow a person called upon to show cause to appear by pleader.

Inquiry as to truth of information.

117. When an order under section 112 has been read or explained under section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which he has acted, and to take such further evidence as may appear necessary.

Such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials in summons-cases; and where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials in warrant-cases, except that no charge need be framed.

For the purposes of this section the fact that a person is an habitual offender may be proved by evidence of general repute or otherwise.

See the Explanation to s. 491 of Act X of 1872, and see also s. 515, para. 3, of the same Act.

In *In the matter of Kookor Singh*, 1 C. L. R., 130, it was held, that a person against whom proceedings for bad livelihood were taken was entitled to have embodied in a charge the precise matter which the Magistrate considered established by evidence against him. This section lays down a distinct procedure, but provides that it shall be unnecessary in such cases to frame a charge. See *Empress* v. *Babua*, I. L. R., 6 All., 132.

When a Magistrate does not find that a person is himself likely to commit a breach of the peace, he cannot order him to furnish security, and hold him by anticipation responsible for the result of resistance to acts which are not shown to be illegal or likely to induce a breach of the peace.—*In re Sheo Surn Lall*, 3 C. L. R., 280; see *In re Kashi Chunder Doss*, 10 B. L. R., 441; (S. C) 19 W. R., 47. In the former case a tehsildar applied for assistance from the Police while distraining the crops of certain ryots. On this being reported to the Magistrate, he required the

tehsildar to give security to keep the peace, on the ground that any riot which might result from the resistance of the ryots would be attributable to his acts. The order of the Magistrate was set aside as illegal by the High Court. See *Reg.* v. *Abdul Huq*, 20 W. R., Cr., 57.

Under Act X of 1872, it was repeatedly held, that a Magistrate could not bind over a person to keep the peace until he had adjudicated on the evidence before him, the intention of the Legislature being that a person accused should have an opportunity of exculpating himself.—*Reg.* v. *Isreepershad Singh*, 20 W. R., Cr., 18; *In re Umda Khanum*, 3 C. L. R., 72; *Rajah Run Bahadoor Singh* v. *Ranee Tilessuree Koer*, 22 W. R., Cr., 79; *In re Nursingh Narain*, 10 W. R., Cr., 1; *Ramkissore Acharjee Chowdhry* v. *Arip Khan*, 21 W. R., Cr., 6; *Goshain Luchmun Pershad Pooree* v. *Pohoop Narain Pooree*, 24 W. R., Cr., 30; *Noor Mohamed* v. *Nil Rutun Bagchee*, 18 W. R., Cr., 2; *Maghan Misra* v. *Chamman Teli*, 2 B. L. R., Ap. Cr., 7; *In re Okhil Chunder Biswas*, 1 C. L. R., 48. See *Reg.* v. *Gungaram Potdar*, 24 W. R., Cr., 10.

Procedure.—The procedure to be followed under this Act is prescribed by Chapters XX and XXI, *infra.* Under the former chapter no provision is made for the cross-examination of witnesses, but it would, no doubt, be held, as under Act X of 1872, that an opportunity must be given to the parties of cross-examining witnesses.—*Noor Mahomed* v. *Nil Rutun Bagchee*, 18 W. R., F. B., Cr., 2. See *Reg.* v. *Nusseerooddeen*, 2 All. H. C. R., 461; and *Reg.* v. *Shunkur*, 2 All. H. C. R., 406; and *Mad. H. C. Pro., 3rd Nov.* 1858, *Weir*, p. 37; *Ramkissore Acharjee Chowdhry* v. *Arip Khan*, 21 W. R., Cr., 6. Chapter XXI, by s. 256, makes provision for the accused, "at any time while he is making his defence, to recall and cross-examine any witness for the prosecution present in the Court or in its precincts."

It was held, under Act X of 1872, that the Magistrate was bound to assist both parties in producing their witnesses.—*Reg.* v. *Cheyt Singh*, 22 W. R., Cr., 70; see *In re Koohor Singh*, 1 C. L. R., 130. According to the procedure laid down in Chapters XX and XXI, it appears to be in the discretion of the Magistrate to summon such witnesses offered by the parties as he thinks fit. See ss. 244, 255, 257, *infra.* Under the last of these sections the Magistrate must record his reasons for refusing to summon witnesses whose attendance is desired by the accused.

Before an order can be made under this section, the inquiry must show upon the evidence that there is a reasonable probability of a breach of the peace, and not merely a bare possibility of a breach of the peace.—*Reg.* v. *Abdul Huq*, 20 W. R., Cr., 57; *Goshain Luchmun Pershad Pooree* v. *Pohoop Narain Pooree*, 24 W. R., Cr., 30; *In re Sheo Surn Lall*, 3 C. L. R., 280; *In re Kashi Chunder Dass*, 10 B. L. R., 441; (S. C.) 19 W. R., Cr., 47. The onus is on the party on whose information or complaint the summons or warrant, as the case may be, was issued.—*Dunne* v. *Hem Chunder Chowdhry*, 12 W. R., Cr., 60; *Reg.* v. *Nirunjun Singh*, 2 All. H. C. R., 431.

Where the ground of complaint to which the summons has reference is found by the Magistrate to be unfounded, the Magistrate cannot proceed to adjudicate that an entirely different ground existed upon which it was likely the person summoned would commit a breach of the peace.—*Ramkissore Acharjee Chowdhry* v. *Arip Khan*, 21 W. R., Cr., 6.

Notwithstanding the introduction of the words 'accused' and 'conviction,' the provisions of s. 350, *post*, apply to an inquiry instituted under s. 107, with a view to enforcing the giving of security against a breach of the peace. And in such a case, where the Magistrate by whom only part of the evidence has been taken is succeeded by another Magistrate while such inquiry is pending, the person called upon to show cause under the latter section may insist upon the recall and re-examination of the witnesses whose evidence has already been taken by the former Magistrate.—See *Buroda Kant Roy* v. *Korrimuddi Moonshee*, 4 C. L. R., 452.

Evidence.—It is only evidence of specific conduct on the part of the accused from which the reasonable and immediate inference is that they are likely to commit a breach of the peace, which will justify a Magistrate in adjudicating under this chapter.—*Rajah Run Bahadoor Singh* v. *Ranee Tilessuree Kooer*, 22 W. R., 79. The mere record of previous convictions on account of which a person has undergone punishment does not satisfy the requirements of ss. 110, 117 and 118, and it is manifestly wrong to use these provisions so as to add to the punishment of

Ch. VIII s. 118 past offences.—*In re Raja Valad Hussain Saheb*, I. L. R., 10 Bom., 174. See *Empress* v. *Nawab*, I. L. R., 2 All., 935; and *In re Soobooddhi*, 6 W. R., Cr., 6. There must be additional evidence that he has resumed avocations indicating on his part an intention to return to his former course of life—*In re Haider Ali*, I. L. R., 12 Calc., 520.

The evidence must be legal evidence taken and recorded. The report of a Subordinate Magistrate would not be sufficient (*Reg.* v. *Jivanji Limji*, 6 Bom. H. C. R., Cr., 1; *Reg.* v. *Dalpatram Pemabhai*, 5 Bom. H. C. R., Cr., 105), though such report would be sufficient information upon which the Magistrate might issue a summons—*Ibid.*

Showing cause is not the mere putting in a written, or making a verbal, statement, but the supporting of that statement by such evidence as the party may be able to produce.—*Chulan Tewari* v. *Sukedad Khan*, 23 W. R., Cr., 9. If, however, the party against whom the order is made admits the truth of the information upon which it is based, it would seem to be unnecessary to proceed with the inquiry. —*Reg.* v. *Lall Beharee Singh*, 11 W. R., Cr., 50, *sed quære*. In *Reg.* v. *Irapabin Basapa*, 8 Bom. H. C. R., Cr., 162, it was held, that evidence, that is legal evidence, must be recorded. See *Reg.* v. *Isreepershad Singh*, 20 W. R., Cr., 18; and *Ramkissore Acharjee Chowdhry* v. *Arip Khan*, 21 W. R., Cr., 6. The evidence must be taken in the presence of the person called upon to show cause.—*Ib.*

It should be borne in mind that separate proceedings should be taken against each person ordered to find security, unless it is clear that there is such a connection between the parties as indicates the necessity of a contrary course.—*Mad. H. C. Pro.*, 17*th March* 1863, *Weir*, p. 36. See *Empress* v. *Nathu*, I. L. R., 6 All., 214.

Under s. 491 of Act X of 1872 (s. 107, *supra*), it was held, that an order postponing proceedings until the person called upon to show cause should have established in a Civil Court the title claimed by him to the property in dispute, and with reference to which it was alleged there was a likelihood of a breach of the peace, amounted to a discharge.—*Empress* v. *Dhuniram*, 5 C. L. R., 366.

Order to give security.

118. If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly:

Provided—

first—that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112:

secondly—that the amount of every bond shall be fixed with due regard to the circumstances of the case, and shall not be excessive:

thirdly—that when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

The first part of this section corresponds generally with s. 497 of Act X of 1872, and with s. 220 of Act IV of 1877. The second proviso is in accordance with para. 1 of s. 493 of the former Act, with a further provision that the bond shall not be excessive. The addition seems to have been suggested by the cases of *Empress* v. *Dedar Sircar*, I. L. R., 2 Calc., 384; (S.C.) 1 C. L. R., 95; see also *Mad. H. C. Pro.*, 26*th April*, 1869; *Weir*, p. 36; *In re Nilmadub Ghosal*,

19 W. R., Cr., 1; *In re Umbica Prosad*, 1 C. L. R., 268; *In re Juggut Chunder Chuckerbutty*, I. L. R., 2 Calc., 110; (S. C.) 1 C. L. R., 48; and *Empress* v. *Kala Chand Dass*, 6 C. L. R., 128; (S. C.) I. L. R., 6 Calc., 14. See *Ram Sing* v. *Empress*, Punjab Rec., 1883, p. 1. In the first of these cases it was said that the amount of the security to be prescribed should be such as to afford the person against whom the order was made a fair chance of complying with the order. It was considered that security of Rs. 2,000 in four sureties of Rs. 500 each, or in default imprisonment (*In re Umbica Proshad*, 1 C. L. R., 268), and a recognizance of Rs. 10,000, with two sureties of Rs. 5,000 each (*In re Juggut Chunder Chuckerbutty*, I. L. R., 2 Calc., 110; (S. C.) 1 C. L. R., 48), were excessive and unreasonable. In the case of *The Empress* v. *Kala Chand Dass*, I. L. R., 6 Calc., 14; (S. C.) 6 C. L. R., 128, where it appeared that the securities required were prohibitive, the High Court modified the orders and reduced the amounts of the securities to what it considered reasonable under the circumstances.

The last proviso to the section is new.

It would seem that, notwithstanding the first proviso, it would be competent to the Magistrate under this section to make an order upon the inquiry discharging the accused upon his own recognizance, although the order made under s. 112 should have required a bond with sureties.

The order should not be for the extreme term except when absolutely necessary.—*Empress* v. *Nathu*, I. L. R., 6 All., 219. See the notes to s. 110, *ante*, p. 80.

It is only the person in respect of whom the inquiry is made who can be ordered to give security. It is illegal to take recognizances from one person in order to prevent another committing a breach of the peace.—*Ram Coomar Banerjee* v. *Rajah Gopal Singh Deb*, 17 W. R., Cr., 54.

An order to execute a second recognizance during the time the first recognizance is in force was held to be illegal under the Code of 1861.—*Reg.* v. *Kumodini Kant Banerjee Chowdhry*, 9 B. L. R., App., 30. See *In re Juswunt Singh*, 6 W. R., Cr., 18.

Appeal.—Any person required by a Magistrate other than the District Magistrate or a Presidency Magistrate to give security for good behaviour under this section may appeal to the District Magistrate.—*Section* 406, *infra*. But there is no appeal in other cases of this class.—*Chand Khan* v. *Empress*, I. L. R., 9 Calc., 878.

As to rejection or discharge of sureties, see ss. 122, 126, *infra*.

Discharge of person informed against.

119. If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect, and, if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

This section corresponds generally with s. 496 of Act X of 1872, and with s. 219 of Act IV of 1877. It points more specifically than the former Acts did to the necessity of proof that there is occasion to require security.

Where the information upon which the summons was issued is found on inquiry by the Magistrate to be unfounded, he cannot proceed to adjudicate that an entirely different ground existed upon which it was likely the person called upon to show cause would commit a breach of the peace.—*Ramkissore Acharjee Chowdhry* v. *Arip Khan*, 21 W. R., Cr., 6.

Ch VIII ss. 120-121

C.—Proceedings in all Cases subsequent to Order to furnish Security.

Commencement of period for which security is required.

120. If any person in respect of whom an order requiring security is made under section 106 or section 118 is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

In other cases such period shall commence on the date of such order.

This section corresponds generally with s. 489, para. 2, and s. 504, para. 2, of Act X of 1872; and with ss. 210 and 224 of Act IV of 1877.

Under these Acts, however, where the person to be bound was undergoing sentence for an offence, it was directed that he should be brought up on or after the expiration of his sentence for the purpose of being bound.

In *Reg.* v. *Shona Dagee*, 24 W. R., Cr., 13, it was held, that when the conviction of an offence is contemporaneous with an order for taking security for good behaviour (as under s. 106 of this Act), ss. 504—506 of Act X of 1872 contemplated that the sentence for that offence should first be carried out, and the person to be bound should then be brought up for the purpose of being bound. So, in the case of *Empress* v. *Partab*, I. L. R., 1 All., 666, where an accused person was sentenced to be rigorously imprisoned for dishonestly having received stolen property, and for being by repute a thief, and on the expiration of the term of imprisonment ordered to furnish security for good behaviour,—it was held by SPANKIE, J., that a proceeding should have been drawn up, representing that the Magistrate was satisfied from the evidence that the accused was by repute a thief, and therefore security should be required of him; and that an order should have been recorded to the effect that, on the expiry of the imprisonment, the accused should be brought up for the purpose of being bound. See *Tamiz Mandal* v. *Umid Karigar*, I. L. R., 9 Calc., 215.

Under this section it would seem that there is no necessity for the accused being brought up on the expiration of the term of imprisonment, but that he may be required at once to furnish the requisite security. Section 123, however, provides, that if any person does not give security on or before the date on which the period for which such security is to be given commences, he shall, if he is already in prison, be detained in prison until such period expires, or until within such period he gives the security required.

Contents of bond.

121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

This section corresponds with para. 6 of s. 502 of Act X of 1872 and with s. 227 of Act IV of 1877.

As to the procedure on forfeiture of bonds, see Chap. XLII, *post*.

Para. 6 of s. 502 of Act X of 1872 provided, that "the commission, or attempt to commit, or abetment, of any offence whatever, and wherever it may be committed, is a breach of the bond." The Madras High Court was of opinion that that paragraph was not to be read as a definition of the acts which would give rise to the liability to the penalty of the bond, so as to confine the liability to occasions on which some actually punishable offence had been committed so as to render it incumbent on the prosecutor, in calling upon the defendant to show cause why

the penalty should not be levied, to establish the actual commission of an offence. The Court was satisfied that it was intended merely as an illustration of some modes in which the bond might be broken.—*Ananthacharri* v. *Ananthacharri*, I. L. R., 2 Mad., 169.

A Magistrate ought not to forfeit a recognizance to keep the peace unless the person charged with the breach has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause has been issued.—*Empress* v. *Nobin Chunder Dutt*, 4 C. L. R. (F. B.), 243; I. L. R., 4 Calc. (F. B.), 865.

Power to reject sureties.

122. A Magistrate may refuse to accept any surety for good behaviour offered under this chapter, on the ground that, for reasons to be recorded by the Magistrate, such surety is an unfit person.

This section corresponds with s. 516 of Act X of 1872, with the further provision that the Magistrate must record his reasons for rejecting a surety.

The ground upon which a Magistrate refuses to accept any surety must be valid and reasonable.—*In re Narain Sooboddhee*, 22 W. R., Cr., 37. Thus a Magistrate has no power to impose an arbitrary condition not essential to restrain a party from the infringement of the law, *e. g.*, a condition requiring the accused to furnish two securities being persons of respectability and substance not related to him and residing within one mile from his house.—*Ib.*

Imprisonment in default of security.

123. If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate which or who made the order requiring it, or to the officer in charge of the jail in which the person so ordered is detained.

Proceedings when to be laid before High Court or Court of Session.

When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Court of Session, or, if such Magistrate be a Presidency Magistrate, pending the orders of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court.

Such Court, after examining such proceedings and requiring any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit: Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

Ch. VIII s. 124

Kind of imprisonment.

Imprisonment for failure to give security for keeping the peace shall be simple.

Imprisonment for failure to give security for good behaviour may be rigorous or simple as the Court or Magistrate in each case directs.

The first part of this section is based upon ss. 489 (para. 1, last sentence), 490 (last sentence), 497, 498, 499 (para. 3), and 510 of Act X of 1872, and s. 223 of Act IV of 1877. The second part of the section is based upon ss. 507 and 508 of Act X of 1872, and s. 221 of Act IV of 1877.

The penultimate paragraph follows para. 3 of s. 499 of Act X of 1872.

The last paragraph follows para. 3 of s. 510 of that Act.

This section empowers the Magistrate to take action only where security for a period exceeding one year has been required, and the order has not been complied with, and it applies whether the security be to keep the peace or for good behaviour.

Under the former Codes it was held, that a Magistrate was not justified in increasing the amount of security and in demanding sureties on a summons to show cause, which provided only for a recognizance of much smaller amount and which made no mention of sureties at all—*In re Isree Pershad*, 18 W. R., Cr., 61; but that he might, after he had bound down any person to keep the peace, increase the amount of the recognizances.—*Diego De Silva* v. *Jehangeer*, 7 W. R., 23; and see *In re Gooroo Dass Roy*, 18 W. R., Cr., 57. Now, under the first proviso to s. 118, *ante*, p. 88, no person can be ordered to give security of a nature different from or of a larger amount than, or for a longer period than, that specified in the order made under s. 112, a copy of which order, under s. 115, must accompany the summons or warrant.

The order should direct that the person bound to give security be imprisoned until the security is found, provided always that the period of such imprisonment is in no case to exceed the period for which the person is bound.—*Mad. H. C. Pro.*, *4th September* 1874; *Weir*, p. 37. An order merely directing the accused to be "imprisoned till he gives security" is bad.—*Mailamdi Fakir* v. *Tarapulla Pramanik*, I. L. R., 8 Calc., 644.

Appeal.—It is not clear, as under s. 507 of Act X of 1872, that the Magistrate would have power to act where the security required had not been given by reason of sureties being rejected under the preceding section. Under Act X of 1872, s. 508, no appeal lay from an order of a Sessions Court fixing a period of detention for an accused person who refused to furnish security.—*Reg.* v. *Roghoo Dome*, 24 W. R., Cr., 12. It would seem that no appeal would lie under this Act from an order made by a Sessions Court on reference under this section. See ss. 406, 410, *infra*. There is no appeal from an order passed by the District Magistrate or Presidency Magistrate under this section.—*Chand Khan* v. *Empress*, I. L. R., 9 Calc., 878.

For form of warrant for commitment on failure to find security to keep the peace, see Sched. V, No. 13; and for warrant of commitment on failure to find security for good behaviour, see Sched. V, No. 14.

Power to release persons imprisoned for failing to give security.

124. Whenever the District Magistrate or a Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this chapter, whether by the order of such Magistrate or that of his predecessor in office, or of some subordinate Magistrate, may be released without hazard to the community or to any other person, he may order such person to be discharged.

Whenever the District Magistrate or a Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this chapter as ordered by the Court of Session or High Court may be released without such hazard, such Magistrate shall make an immediate report of the case for the orders of the Court of Session or High Court, as the case may be, and such Court may, if it thinks fit, order such person to be discharged.

The first part of this section consolidates ss. 500 (last part) and 511 of Act X of 1872, and s. 225 (para. 2) of Act IV of 1877. The second paragraph consolidates s. 512 of Act X of 1872 and s. 225 (para. 2) of Act IV of 1877.

It applies where the security has been required to keep the peace under s. 106; whereas s. 512 of Act X of 1872 only applied when security was required for good behaviour.

It is only a District Magistrate or a Presidency Magistrate who has power under this section. If any other Magistrate makes an order discharging a person lawfully bound to be of good behaviour, his proceedings are void.—*Section* 530 (*e*), *infra*. No provision is made for the case of a Magistrate not empowered discharging a person lawfully bound to keep the peace.

For form of warrant to discharge a person imprisoned on failure to give security, see Sched. V, No. 15.

Power of District Magistrate to cancel any bond for keeping the peace.

125. The District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace executed under this chapter by order of any Court in his district not superior to his Court.

This section corresponds with s. 500 of Act X of 1872, with a further provision making it necessary for the Magistrate to record his reasons in writing.

For form of warrant to discharge a person imprisoned on failure to give security, see Sched. V, No. 15.

In the case of *Anundee Kooer* v. *Sooneet Kooer*, 10 W. R., Cr., 40, it was held, that a District Magistrate had power to cancel an order summoning a person to show cause why he should not enter into a bond to keep the peace.

The power of cancelling a bond conferred in this section is limited to District Magistrates, and no other Magistrate is competent to cancel a bond for keeping the peace.—*Section* 530 (*f*).

Discharge of sureties.

126. Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class to cancel any bond executed under this chapter within the local limits of his jurisdiction.

On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person for whom such surety is bound to appear or to be brought before him.

Ch. IX s. 127

When such person appears or is brought before the Magistrate, such Magistrate shall cancel the bond, and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of sections 121, 122, 123 and 124, be deemed to be an order made under section 106 or section 118, as the case may be.

This section consolidates ss. 501 and 513 of Act X of 1872, and s. 226 of Act IV of 1877, making it clear that a Presidency Magistrate, District Magistrate, Subdivisional Magistrate, and Magistrate of the first class may cancel a bond on the application of the surety.

Appeal.—Any person required by a Magistrate other than the District Magistrate to give security for good behaviour under s. 118 may appeal to the District Magistrate.—*Section* 406. Consequently, it would seem that there is an appeal from orders made under this section which may be deemed to be made under s. 118.

CHAPTER IX.

UNLAWFUL ASSEMBLIES.

127. Any Magistrate or officer in charge of a Police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

Assembly to disperse on command of Magistrate or Police-officer.

This section applies to the police in the towns of Calcutta and Bombay.

This section embodies the provisions of s. 480 of Act X of 1872 and s. 43 of Act XI of 1874.

An officer superior in rank to an officer in charge of a Police-station may act under this section.—*Empress* v. *Tucker*, I. L. R., 7 Bom., 42.

An assembly of five or more persons is designated an 'unlawful assembly' if the common object of the persons composing that assembly is to do any of the acts set forth in s. 141 of the Indian Penal Code. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly or continues in it, is said to be a member of an unlawful assembly.—*Indian Penal Code, s.* 142.

Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, is punishable under s. 151 of the Indian Penal Code.

Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.—*Indian Penal Code, s.* 145.

Act V of 1861, s. 15, provides, that additional police may be quartered in disturbed or dangerous districts, the cost of such police being chargeable on the inhabitants of the districts. Section 17 of the same Act empowers any Police-officer not below the rank of an inspector to apply to the nearest Magistrate to appoint so many residents of the neighbourhood as such Police-officer may require to act as special Police-officers.

128. If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a Police-station, whether within or without the Presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act, 1869, and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

Use of civil force to disperse.

This section takes the place of s. 481 of Act X of 1872, with certain additions. It puts volunteers enrolled under Act XX of 1869 on the same footing as officers or soldiers of Her Majesty's Army for the purposes mentioned in the section.

Act XX of 1869, s. 24, provides, that "any member of such corps (of volunteers), whenever he is on duty, may prevent any disturbance of the public peace and disperse any persons whom he may find assembled together to the number of five or more without reasonable cause, between sunset and sunrise, in any public street, thoroughfare or other public place in which such member of the said corps may be in the discharge of his duty."

The words at the end of the section giving power to confine "the persons who form part of the unlawful assembly in order to disperse such assembly, or that they may be punished according to law" are new.

Section 31 of Act V of 1861 provides, that it shall be the duty of the police to keep order in the public places mentioned in the section and to prevent obstructions on the occasions of assemblies and processions in public places; and s. 32 of the same Act provides, that any persons disobeying orders of the police shall be liable to certain penalties. See Act XXIV of 1859 (Madras Police), s. 49; and Act VII (Bom.), 1867, ss. 27 and 28.

Section 42 of this Act, *ante*, p. 32, provides, that "every person is bound to assist a Magistrate or Police-officer demanding his aid whether within or without the Presidency-towns (*a*) in the taking of any other person whom such Magistrate or Police-officer is authorized to arrest; (*b*) in the prevention of a breach of the peace or of any injury attempted to be committed to any railway, canal, or public property; (*c*) in the suppression of a riot or affray.

It is only when acting as such, that an officer or soldier or volunteer may not be required to assist a Magistrate or officer in charge of a Police-station. When acting as private citizens, such persons may be called upon to assist in the same manner as ordinary private citizens.

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.

Use of military force.

This corresponds with s. 482 of Act X of 1872.

130. When a Magistrate determines to disperse any such assembly by military force, he may require any Commissioned or Non-Commissioned Officer in command of any soldiers in Her Majesty's Army or of any volunteers

Duty of officer commanding troops required by Magistrate to disperse assembly.

Ch. IX secs. 131-132 enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

Every such officer shall obey such requisition in such manner as he thinks fit; but in so doing he shall use as little force, and do as little injury, to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

This section embodies s. 484 of Act X of 1872, with a few verbal and other alterations.

Instead of 'any officer' it substitutes the words any 'Commissioned or Non-Commissioned Officer;' and it puts volunteers on the same footing as Her Majesty's Army, for the purposes mentioned in the section.

It leaves it entirely in the discretion of the officer in command as to how he will disperse the assembly or arrest and confine the persons forming part of it.

Power of Commissioned military Officers to disperse assembly.

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any Commissioned Officer of Her Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

This section embodies s. 487 of Act X of 1872, except as to the protection afforded by that section (for which provision is made by the next section of this Act). In addition to the power to disperse, it gives further power to arrest and confine persons forming part of the unlawful assembly in order to disperse such assembly, or that they may be punished according to law.

The section empowers Commissioned Officers only.

Protection against prosecution for acts done under this chapter.

132. No prosecution against any Magistrate, Military officer, Police-officer, soldier or volunteer for any act purporting to be done under this chapter shall be instituted in any Criminal Court, except with the sanction of the Governor-General in Council; and

(*a*) no Magistrate or Police-officer acting under this chapter in good faith,

(*b*) no officer acting under section 131 in good faith,

(*c*) no person doing any act in good faith in compliance with a requisition under section 128 or section 130, and

(*d*) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which under military law he was bound to obey, Ch. X s. 133

shall be deemed to have thereby committed an offence.

The first part of this section is based upon s. 488 of Act X of 1872. It makes it now necessary in all cases of prosecution against the persons mentioned therein to obtain the previous sanction of the Governor-General in Council. It further gives the protection to volunteers made necessary by the alterations as to volunteers made in the preceding sections. Under Act X of 1872 prosecutions might have been instituted with the sanction of the Government of India or the Governments of Madras and Bombay.

The remaining portions of the section are in accordance with ss. 483, 485, and 486 of Act X of 1872, with an addition giving protection also to volunteers.

An Act is said to be done with good faith, if done with due care and attention.—*Indian Penal Code*, *s.* 52.

Section 537, *post*, provides that no finding, sentence or order of a competent Court shall be set aside under Chap. XXVII or on appeal or revision, unless it has occasioned a failure of justice on account of any want of sanction under s. 195. It is silent as to the want of sanction under this or s. 197, *post*.

CHAPTER X.

PUBLIC NUISANCES.

Conditional order for removal of nuisance.

133. Whenever a District Magistrate, a Subdivisional Magistrate or, when empowered by the Local Government in this behalf, a Magistrate of the first class, considers, on receiving a report or other information and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that any trade or occupation, or the keeping of any goods or merchandise, by reason of its being injurious to the health or physical comfort of the community, should be suppressed or removed or prohibited, or

that the construction of any building, or the disposal of any substance as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence its removal, repair or support is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public,—

such Magistrate may make a conditional order requiring

Ch. X s. 133 the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, substance, tank, well or excavation, within a time to be fixed in the order,

to remove such obstruction or nuisance ; or
to suppress or remove such trade or occupation ; or
to remove such goods or merchandise ; or
to prevent or stop the construction of such building ; or
to remove, repair or support it ; or
to alter the disposal of such substance ; or
to fence such tank, well or excavation, as the case may be ; or

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in manner hereinafter provided.

* No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

EXPLANATION.—A 'public place' includes also property belonging to the state, camping grounds, and grounds left unoccupied for sanitary and recreative purposes.

This section follows generally the provisions of s. 521 of Act X of 1872.

The provision in the first paragraph, that the Magistrate may take proceedings on a report or other information, or upon taking such evidence (if any) as he thinks fit, is in accordance with the last paragraph of s. 521 of Act X of 1872. It is in the discretion of the Magistrate to take evidence or not.

The following alterations and additions have been made:—

Para. 2.—For the words 'from any thoroughfare or public place,' this Act substitutes the words 'from any way, river or channel which is or may be lawfully used by the public, or from any public place.'

Para. 3.—The words 'keeping of any goods or merchandise' are new. 'Physical comfort' has been substituted for 'comfort,' an alteration which would seem to have been suggested by the case of *Sathu Valad Kadir Sausaree* v. *Ibrahim Aga Valad Mirza Aga*, I. L. R., 2 Bomb., 457.

Para. 4.—The words 'or explosion' after 'conflagration' are new.

Para. 6.—'Such way' has been substituted for 'any public thoroughfare.'

Para. 7.—Except that it is provided that the order which may be made is a *conditional* order, the alterations in the paragraph are in the main verbal only.

Under Act X of 1872, where the Magistrate considered any building to be in such a state of weakness as to be dangerous, he was empowered only to order its removal. This section empowers the Magistrate to direct that it be removed, or that it be repaired or supported.

While the order under s. 521 of Act X of 1872 directed the person on whom it was issued in the alternative to show cause why the order should not be enforced, the alternative direction in this section directs such person to appear and move to have the order set aside or modified.

The procedure to be followed, where appearance is entered, is laid down by the sections next following.

The last paragraph of this section, providing that no order thereunder shall be questioned in a Civil Court, is in accordance with *Rooke* v. *Pyari Lall*, 3 B. L. R., Appx., 43 ; (S. C.) 11 W. R., 434.

cremation ground properly kept and used cannot be considered a public nuisance.
I.L.R. 19 Mad p 464 referred to
Held also that although a burning ghat may not in itself be a nuisance within the meaning of cl 2 sec 133 Cr P C still a Magistrate would have jurisdiction under that clause if it were shewn that such a ghat is in such an offensive state or that cremation is carried on upon it in such an offensive manner as to be a source of injury or annoyance to persons living in the vicinity.
In the matter of Indranath Banerji
L. C. W. 1 LXXXIX

The magistrates order under this section is not conclusive determination of the question of title
The Secretary of State for India in Council v Jethabhai I.L.R. 17 Bom 293

The Explanation follows that of s. 521 of Act X of 1872. Ch. X s. 133

Presidency Towns.—It is to be noted that Presidency Magistrates are not empowered to act under this chapter, which applies only to District Magistrates, Subdivisional Magistrates and Magistrates of the first class specially empowered. In cases of nuisances, Presidency Magistrates act under the Penal Code, the Police Acts, and such other local Acts as deal with special forms of nuisance, as, for instance, the Fire Brigade Act or Smoke Nuisance Act. Under the Penal Code a person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantages.—S. 268. Sections 268—294 of the Penal Code deal with nuisances.

In Madras and Bombay, Magistrates of the first class were empowered to act under s. 521 of Act X of 1872.—*Madras Gazette*, 1873, p. 717; *Bombay Gazette*, 1872, p. 1325; and also *ibid*, 1873, p. 16. So in the Panjab, Magistrates of the first class have powers, subject to the general control of the Magistrate of the District, to make orders in local nuisance cases.—*Panjab Gazette*, 1878, Part I, p. 361.

All senior officers at head-quarter stations under the Magistrate of the District in the Panjab were, under s. 521 of Act X of 1872, invested with power to make orders, &c., in local nuisance cases. For the purposes noted in this paragraph, the Senior Assistant Commissioner, being a first class Magistrate, is to be deemed to be the senior officer under the Magistrate, and if there is no Assistant Commissioner who is a first class Magistrate, the Senior Extra Assistant Commissioner, being a first class Magistrate, is to be deemed to be the senior officer under the Magistrate.—*Panjab Gazette*, 1873, p. 75.

Procedure.—A Magistrate who has commenced proceedings under this section, is not at liberty to proceed otherwise than in conformity with the rules laid down in the sections following.—*Reg.* v. *Pitti Sing*, 1. W. R., Cr., 37. He cannot proceed to pass an order for the removal of a nuisance without calling upon the party to show cause why the order should not be passed against him, and without hearing the objections, even if they are filed after the time fixed for their presentation, provided they are filed before he takes up the case.—*In re Bistoo Chunder Chuckerbutty*, 10 W. R., Cr., 27; *Reg.* v. *Janokenath Bhuttacharjee*, 2 W. R., Cr., 36.

Before a Magistrate could make an order under s. 521 of Act X of 1872 to remove an obstruction from a path alleged to be a public thoroughfare, it was held that he must first, on a proceeding had under s. 532, have come to a conclusion that the path was open to the public.—*In re Chunder Nath Sen*, I. L. R., 5 Calc., 875; (S. C.) 6 C. L. R., 379. There a Magistrate ordered the removal of an obstruction from a pathway under s. 521, and had further submitted this order to the consideration of a jury appointed under s. 523, before he had himself come to any conclusion whether the pathway was a public thoroughfare; and it was held, that the only course open to him was to stay all proceedings initiated by him under s. 521, and take action under s. 532. So, in *In re Becharam Bhuttacharjee*, 15 W. R., Cr., 67, it was laid down that, on a complaint for the removal of an obstruction from a thoroughfare, a Magistrate should first enquire if the road is public or not. If he finds in the affirmative, he has jurisdiction. See *Roy Omesh Chunder Sen* v. *Ichanath Mozumdar*, 21 W. R., Cr., 64; *Petambur Jugi* v. *Nasaruddy*, 25 W R., Cr., 4.

Under the present Act the Magistrate is bound to act, in the first instance, upon a report or other information or upon evidence taken by him, if he should think fit to take such evidence.

If, however, a Magistrate making an order under this section considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made as is required to obviate or prevent such danger or injury. In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.—s. 142, *infra*.

In the case of ***Makhan Lal Saha* v. *Makhan Churn Saha***, I. L. R., 11 Calc., 271, an application was made under this section for the removal of an obstruction in a

Ch. X s. 133 public thoroughfare, but after a personal local inspection by the Magistrate, and without any evidence being taken, the parties were referred to a civil suit, and the order was refused, the Magistrate holding that the way was not a public way. A civil suit was then filed, and during its pendency a second application was made under this section, with a like object, and was refused on the ground that the civil suit was pending, and that there was no likelihood of a breach of the peace. The civil suit resulted in the way being held to be a public thoroughfare. A third application was then made under this section to have the obstruction removed, but the Magistrate held that, on face of the two previous orders, he could not interfere. The High Court held, that the order of the Magistrate was wrong, upon the ground that he was bound to make inquiry, and as there never had been any inquiry into the matter, the first decision being no decision at all, but a mere dictum of the Magistrate upon a personal local investigation without hearing evidence, and thus not on judicial inquiry, and the second decision being based merely upon the pendency of the civil suit and the previous improper order, and that neither of these orders operated therefore as a bar to the Magistrate inquiring into the matter of the complaint upon the third application.

Nuisance in any way, river, or channel open to public.—As already pointed out, this section has substituted the words 'way, river, or channel which may lawfully be used by the public' for the word 'thoroughfare.'

In proceedings under this head it is necessary to show two things: *first*, that the act complained of is a nuisance or obstruction; and, *second*, that it was committed in a public place or place which may lawfully be used by the public.—*Hadjee Muzhur Ali* v. *Gundowree Sahoo*, 25 W. R., Cr., 72; *In re Shah Soojaut Hossein*, 22 W. R., Cr., 19. See *In re Chundernath Sen*, I. L. R., 5 Calc., 875; (S. C.) 6 C. L. R., 379, and the cases there cited.

The obstruction of a private path is not a nuisance under the section.—*Reg.* v. *Janokenath Bhuttacharjee*, 2 W. R., Cr., 36.

The order of the Magistrate should be confined to a direction to remove the obstruction or nuisance.—*In re Paul Dass*, 10 W. R., Cr., 51.

In the case of a tank which has become a nuisance, the Magistrate cannot order the proprietor to excavate it. The proprietor ought to have a discretion allowed him as to the mode in which he will remove the nuisance caused by the tank. If the Magistrate is subsequently compelled to direct the excavation of the tank, the actual cost of excavation can alone be charged against the proprietor at whose disposition the soil taken out in the excavation must be placed.—*In re Paul Dass*, 10 W. R., Cr., 51. So, if necessary, a Magistrate may cause a tank to be filled up.—*In re Bistoo Chunder Chuckerbutty*, 10 W. R., Cr., 27.

Trade or occupation.—It is to be observed that "person" includes "any company or association or body of persons whether incorporated or not."—Indian Penal Code, s. 11, see s. 4 (*w*), *ante*. Accordingly companies or associations may equally with private individuals be proceeded against under this section.

No length of employment can legalise a trade or occupation which is a public nuisance.—*Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali*, 7 B. L. R., 499; see *Weld* v. *Hornby*, 7 East, 199; *Rex.* v. *Cross*, 3 Camp., 224. See *Indian Penal Code*, s. 268 (last clause). In the first of these cases the condition and conduct of a long-established slaughterhouse was proved to be, in fact, an offensive nuisance, but there was no evidence to show that the slaughterhouse was in a worse condition than it had been at any time since its establishment. The Magistrate was held to be justified in suppressing the trade carried on at the slaughterhouse, although it had been commenced under magisterial sanction.

This section does not warrant a Magistrate interfering with a prostitute for the purpose of removing her from her dwelling-house on the ground of her profession, so long as she behaves herself orderly and quietly and creates no open scandal by riotous living.—*Nundo Kumaree Peshagar* v. *Anund Mohun Gooho Thakurta*, 24 W. R., Cr., 68. As to punishment for keeping disorderly houses, see Police Act, Act IV of 1866, s. 43 (Calcutta); Act VI of 1866, s. 17 (Calcutta Suburban); Act XXIV of 1859 (Madras); and Act VII of 1867 (Bombay).

In *Hajee Muzhur Ali* v. *Gundowree Sahoo*, 25 W. R., Cr., 72, it was said that acts which are shocking to the prejudice of a caste are not necessarily nuisances, and, at any rate, if done in a private place, could not be dealt with under s. 521 of Act X of 1872.

Building in dangerously weak state.—Where buildings are in a dangerous state, it is manifest that removal would not in all cases be necessary. This section accordingly provides that the Magistrate may direct that they should be repaired or supported. Ch. X s. 133

Tank or well adjacent to public way.—In the case of a tank considered merely as a reservoir of water, the Magistrate's powers extend only to having the tank fenced in, the object being to prevent accidents; but when a tank is a half dry excavation into which the people are in the habit of throwing rubbish, and which has from this cause become a public nuisance, injurious to the health and comfort of the community, the Magistrate may cause the tank to be filled up, if that is the only way of suppressing the nuisance—*In re Bistoo Chunder Chuckerbutty*, 10 W. R., Cr., 27; see *In re Paul Dass*, 10 W. R., Cr., 51.

Jurisdiction of Criminal Courts.—A Magistrate's powers under s 521 of Act X of 1872, it was held, were confined to the instances specifically mentioned in the section.—*In re Shah Soojaut Hossein*, 22 W. R., Cr., 19. The section does not confer general powers upon a Magistrate to pass any order he may consider necessary for the preservation of the public health. See *Ibid.* Thus, an application to have it declared that a certain place cannot be used for the purposes of cremation cannot be dealt with under it.—*Gudadhur Kamila* v. *Baida Nath Jana*, 22 W. R., Cr., 6.

The obstruction of a drain into which the complainant's sewage falls is not within the provisions of these sections, but is a case for a civil suit and injunction. —*In re Troylukhonath Bose*, 5 W. R., Cr., 58; *Sham Doss* v. *Bhola Doss*, 1 W. R., 324.

The obstruction of a private path is, as above mentioned, not a nuisance which can be dealt with by a Criminal Court.—*Reg.* v. *Janokenath Bhuttacharjee*, 2 W. R., Cr., 36. As already stated, acts which are shocking to the prejudice of a caste are not necessarily nuisances, and, at any rate, if done in a private place, cannot be dealt with under this section.—*Hadjee Muzhur Ali* v. *Gundowree Sahoo*, 25 W. R., Cr., 72.

The Magistrate can only deal with existing obstructions. He has no power to direct what is to be done in case of any future obstruction.—*Kashi Chunder Chuckerbutty* v. *Yar Mahomed*, 2: W. R., Cr., 10.

This section and ss. 134—137, *post*, are not intended to be exercised where there is a *bonâ fide* dispute as to the existence of a public right. Where there is such a dispute, the Court should pass no order until the public right has been established by proper legal proceedings, civil or criminal.—*Basaruddin Bhinah* v. *Baha Rali*, I. L. R., 11 Calc., 8. These sections do not contemplate an inquiry into disputed questions of title raised *bonâ fide*.—*Askar Mea* v. *Sabdar Mea*, I. L. R., 12 Calc., 137.

Where a District Magistrate, in a proceeding under this section, satisfies himself that there is no necessity for proceeding further, he is competent to let the matter drop.—*In re Issur Chunder Nath*, I. L. R., 8 Calc., 883; (S. C.) 11 C. L. R., 235; *In re Shonai Paramanick*, 1 C. L. R., 486.

Jurisdiction of Civil Courts.—As under s. 521 of Act X of 1872, so under this section, no order made by a Magistrate can be called in question by a Civil Court, even on the ground that it was made without jurisdiction, as where it is alleged that the land in respect of which an order was made was private property, and not a thoroughfare or public place.—*Mutty Ram Sahoo* v. *Mohi Lall Roy*, I. L. R., 6 Calc., 291; (S. C.) 7 C. L. R., 433; see *Rooke* v. *Peari Lall*, 3 B. L. R., Appx., 3; (S. C.) 11 W. R., 434. But where an order has been made, *e.g.*, for the removal of an obstruction or nuisance from a particular place, it is competent to a Civil Court, irrespective of such order, to try the question whether the place is private property and not a public way or public place.—*Mutty Ram Sahoo* v. *Mohi Lall Roy*, I. L. R., 6 Calc., 291; (S. C.) 7 C. L. R., 433, *per* FIELD, J.; see *Gooroo Pershad Roy* v. *Probhoo Ram Chuttapadhya*, 19 W. R., 426; *Reg.* v. *Bolton*, 1 Q. B., 66; *Brittain* v. *Kinnaird*, 1 B. and B., 432.

The persons aggrieved by an order under this chapter cannot sue the parties who instituted the proceedings before the Magistrate for damages, unless they can show that, in taking such proceedings, they were actuated by malicious motives, or intended wrongfully to injure.—*Chintamani Bapooha* v. *Digambar Mitter*, 2 B. L. R. (S. N.), xv, *per* PHEAR and HOBHOUSE, JJ.

Revision.—Under the corresponding section (308) of the Criminal Procedure Code of 1861, Act XXV of 1861, it was held, that where an order had been made

Ch. X s. 134 under that section, suppressing a trade or occupation as a nuisance and injurious to the health of the community, the High Court would not interfere, unless it found that there was no reasonable evidence before the Magistrate of the trade being injurious to the health and comfort of the community, or that the cause shown was such as ought to have satisfied the Magistrate that his order for suppressing the trade was not reasonable or proper.—*Municipal Commissioners of Calcutta* v. *Amanet Ali*, 7 B. L. R., 516.

Section 521 of Act X of 1872 expressly declared that an order made thereunder was a judicial proceeding, whether evidence was taken or not. That provision has been omitted in this section. In Bombay, however, it was held, overruling the case of *Ashburner* v. *Keshav*, 4 Bom. H. C. R., A. C. J., 150, that an order under s. 308 of the Code of 1861 was a judicial proceeding, and was therefore open to review by the High Court when an error in law was committed.—*In re Gangaprasad Bin Sobharam*, 9 Bom. H. C. R., 160; see *Collector of Hooghly* v. *Tarak Nath Mookhopadhya*, 7 B. L. R., 449. In Calcutta also, the High Court, in the case of *Angelo* v. *Cargill*, 9 B. L. R., 417, under the same Code held, that where there had been an inquiry whether a particular place was a public place, and whether there was an obstruction, the High Court could not set aside the order except for an error in law, or an excess of jurisdiction, and that it was not a ground for interference that a Magistrate had come to an erroneous decision upon the evidence. Again, under s. 521 of Act X of 1872, it was held in Calcutta that the High Court, as a Court of Revision, would not enter upon a consideration of the value of the evidence upon which the Magistrate decided to act under the section.—*In re Shonai Paramanick* v. *Jogendro Shaha*, 1 C. L. R., 486.

The fact of a Magistrate taking action under the section, it has been held, is *primâ facie* sufficient to show that he considers the *locus in quo* to be a way or other public place, and if no objection is taken that it is not such, and the jury find that the order made under the section is reasonable and proper, the High Court will not interfere.—*In re Imandi Khan*, 8 C. L. R., 399.

Where a person to whom an order has been issued under this section appears to show cause, the Magistrate is bound to take evidence under s. 137.—*In re Mohur Mandar*, 8 C. L. R., 431; *Nimae Churn Dey* v. *Kashie Nath Rakhit*, 26 W. R., Cr.. 7.

If a Magistrate, not being empowered in this behalf, makes an order under this section, his proceedings are void.—*Section* 530 (*g*), *infra*.

Form of order.—Every order must appoint a time within which and a place where the person to whom it is directed may appear before the Magistrate and move to have the order set aside or modified. No conditional order can be made.—*Empress* v. *Brojokanto Roy Choudhuri*, I. L. R., 9 Calc., 637.

For forms of order for the removal of nuisances, see Sched. V, No. 16.

134. The order shall, if practicable, be served on the person against whom it is made in manner herein provided for service of a summons.

Service or notification of order.

If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

This section corresponds generally with s. 522 of Act X of 1872. It further provides, that the summons shall, if practicable, be served in the manner provided for the service of summons. Sections 68—74, *supra*, pp. 49—57, deal with the service of summons. The words directing the summons, where it cannot be served on the person against whom it is made, to be served by proclamation 'published in such manner as the Local Government may direct' are new. The Government of Bengal has directed that the proclamation shall be notified by beat of drum, *Calcutta Gazette*, 1883, Part I, p. 245.

See s. 87, *ante*, p. 63, as to the publication of proclamations.

In *Hockan* v. *Elliot*, 5 W. R., Cr., 4, it was held, that the mere non-service of notice to remove a nuisance was not a sufficient ground for the Court to set aside the Magistrate's order, where it appeared that the parties did not take the objection before the Magistrate, and that they, in fact, admitted knowledge of the existence of the notice and sought to excuse their failure to obey it.

135. The person against whom such order is made shall—

Person to whom order is addressed to obey,

(*a*) perform, within the time specified in the order, the act directed thereby ; or

or show cause or claim jury.

(*b*) appear in accordance with such order, and either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper.

This section corresponds generally with para. 1 of s. 523 of Act X of 1872.

A person who, on receipt of an order by a Magistrate under s. 133, declaring the existence of a right of way over his lands, demands under this section the appointment of a jury to try whether the order was reasonable, is not, by such action, stopped from afterwards bringing a suit in a Civil Court seeking to establish his right to the exclusive enjoyment of the same lands.—*Per* FIELD, J., in *Mutty Ram Sahoo* v. *Mohi Lall Roy*, I. L. R., 6 Calc., 291 ; (S. C.) 7 C. L. R., 433.

An illegal order made under this section may be reversed under s. 439 read with ss. 435 and 423 (*c*). —*Ram Kala* v. *Ganda*, Punjab Rec., 1885, p. 89.

Consequence of his failing to do so.

136. If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by section 135, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code ; and the order shall be made absolute.

See s. 525 of Act X of 1872.

Section 188 of the Indian Penal Code is as follows :—" Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury or risk of obstruction, annoyance, or injury to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both ; and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

" *Explanation.*—It is not necessary that the offender shall intend to produce harm or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces or is likely to produce harm."

Proceedings under s. 188 of the Penal Code can only be taken subject to the provisions of ss. 195 and 487, *post.*

The order will not become absolute until an opportunity has been given to the persons affected by it to show cause why it should not be carried into effect.—*Reg.* v. *Brojendro Lall*, 21 W. R., Cr., 86.

Where objections had been filed after the time fixed for their presentation, but before the case was taken up, it was held, that the Magistrate was not justified

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on that ground in making the order absolute without hearing the party called upon to show cause.—*In re Bistoo Chunder Chuckerbutty*, 10 W. R., Cr., 27.

Procedure where he appears to show cause.

137. If he appears and shows cause against the order, the Magistrate shall take evidence in the matter.

If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

If the Magistrate is not so satisfied, the order shall be made absolute.

The first two paragraphs of this section correspond with the first part of s. 525 and s. 527 of Act X of 1872, as amended by s. 45 of Act XI of 1874. The last clause is new. See *Reg.* v. *Brojendro Lall*, 21 W. R., Cr., 86.

The Magistrate is bound to take evidence, when the party appears and shows cause, and submits to the judgment of the Court.—*Nimae Churn Dey* v. *Kashie Nath Rukhit*, 26 W. R., Cr., 7; *In re Mohur Mandar*, 68 C. L. R., 431.

If the person to whom notice has been issued does not appear within the time limited, but appears before the case is taken up, the Magistrate cannot proceed without hearing his objections.—*In re Bistoo Chunder Chuckerbutty*, 10 W. R., Cr., 27.

Where the Magistrate, being satisfied that the order is not reasonable and proper, takes no further proceedings, the High Court cannot, as a Court of Revision, enter into a consideration of the evidence upon which he decided so to act.—*In re Shonai Paramanick* v. *Jogendro Shaha*, 1 C. L. R., 486; *In re Issur Chunder Nath*, I. L. R., 8 Calc., 883; (S. C.) 11 C. L. R., 235. If, in a case of a complaint respecting an obstruction to an alleged public thoroughfare, he finds that the road is not a public thoroughfare, he has no jurisdiction to proceed, and should abstain from carrying out the order for the removal of the obstruction.—*In re Becharam Bhuttacharjee*, 15 W. R., Cr., 67.

Procedure where he claims jury.

138. On receiving an application under section 135 to appoint a jury, the Magistrate shall—

(*a*) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;

(*b*) summon such foreman and members to attend at such place and time as the Magistrate thinks fit; and

(*c*) fix a time within which they are to return their verdict.

The first part of this section corresponds with s. 523, para. 2; the second and third parts with s. 524, para. 1, and s. 523, para. 5, first sentence, of Act X of 1872.

When the person on whom notice has issued applies for a jury, the Magistrate is bound to appoint one, and cannot decide the matter by local inquiry.—*In re Mothoor Chunder Dass*, 2 C. L. R., 509.

Constitution of jury.—In selecting the members of the jury, the Magistrate should exercise his own independent discretion, and the persons selected by him should not be nominees of the party interested in upholding the Magistrate's order.—*Rajah Shatyanundo Ghosal* v. *The Camperdown Pressing Co.*, 21 W. R., Cr., 43.

[illegible] S. 133 Cr. P. C is made absolute under S. 137 a magistrate must be satisfied by taking evidence in the matter that the order is reasonable and proper, and for that purpose he must take [illegible] the evidence when the matter of the complaint [illegible] whether the opposite party adduces any evidence or not, the reports or other information which the magistrate had received before making the conditional order being no evidence against such party.
(Rajah [illegible] v [illegible] Haldar.
[illegible])

§§ 133 to 138. Nomination of jury by Magistrate. — In the nomination of those members of the jury, the nomination of whom devolves upon the Magistrate under the provisions of sec 138 of the Crim. P. Code, it is his duty to exercise his own independent discretion, and not merely to accept persons who may be put forward by the party opposed to the applicant. A jury constituted in violation of the provisions of section 138 is not legally constituted, and is incapable of making a legally binding award.
16. W. R. Cr 23 & 21 W. R. Cr 43 followed.
[illegible] nath Bhattacharya v. Khitish Bhattac[illegible]
[illegible] 23 Cal 499.

Where a person against whom an order had been made for the abatement of a nuisance applied for a jury, and the Magistrate appointed the complainant and two of his witnesses to be, the former the foreman, and the latter the members, of the jury, it was held, that the jury so constituted was not a proper tribunal, and the proceedings were set aside.—*Brindubun Dutt* v. *Dwarka Nath Sein*, 22 W. R., Cr., 47. In another case, where a jury had been properly appointed, and had fully entertained and considered the matter submitted to it, and the individual members had given in their opinions to the foreman to report to the Magistrate, who delayed in making his report, it was held, that the Magistrate could not appoint a second jury to consider the matter afresh.—*Sheikh Nozumuddy* v. *Hasim Khan*, 21 W. R., Cr., 54. PHEAR, J., said:—"We do not intend to say that, in the event of a jury duly appointed under s. 523 (of Act X of 1872) from some good cause being unable to entertain and determine the matter submitted to it, it is not competent to the Magistrate to appoint a fresh jury. Suppose, for instance, that before the jury had discharged its duties, one of its members died, or suppose the jury became perverse and refused to entertain the matter for which it was appointed, in such cases it may well be that the first order of appointment ought to be considered as having fallen through and become useless, and the Magistrate could have power under s. 523 to appoint a fresh jury." See s. 141, *post*. Ch. X s. 138

A jury is not properly constituted when the Magistrate appoints only the foreman of the jury, allowing the parties to appoint the others.—*Dinonath Chuckerbutty* v. *Hur Govind Pal*, 16 W. R., Cr., 23; (S. C.) 7 B. L. R., Appx., 57. A Magistrate ought not, at the instance of one party, and behind the back of the other, to cancel the appointment of a juror, even if such juror be his own nominee.—*Chunder Nath Sen* v. *Ram Dyal Ghuttuck*, 6 C. L. R., 379; (S. C.) I. L. R., 5 Calc, 875.

Where the duly appointed foreman of a jury, without the knowledge of the Magistrate, substituted another person in the place of one of the jurymen who was sick, and the case proceeded with the jury so freshly constituted, the verdict was set aside.—*Empress* v. *Bhoirub Chunder Datta*, 10 C. L. R., 193. In the case of *Uma Churn Mundle* v. *Joakim Sheik*, I. L. R., 11 Calc., 84, one out of five jurors appointed under this section declined to act on the jury; two out of the remainder of the jury were in favour of a temporary order under s. 133 being maintained, while the other two were against its being so maintained. The Deputy Magistrate declined to pass any order under s. 139, as a majority of the jurors did not find the temporary order to be reasonable and proper, and he therefore struck the case off. The High Court considered that the course taken was irregular, and directed that a fresh jury should be summoned and the case inquired into anew.

Verdict.—The last part of s. 523 of Act X of 1872, which empowered the Court to extend the time within which the jury should return the verdict, has been omitted, but it would seem that, under s. 141, *infra*, the Magistrate has power to extend the time.

The Code of 1861 provided that the functions of the jury should cease on the day fixed, unless the time were extended; and under that Code it was held, where there had been no extension of time and the verdict was returned after the time fixed, that it was illegal and could not be upheld.—*Dinonath Chuckerbutty* v. *Hurgovind Pal*, 16 W. R., Cr., 23; (S. C.) 7 B. L. R., Appx., 57. In such a case it was said the proper course was for the Magistrate to decide the question himself.—*Ibid; In re Shamakant Bundopadhya*, 14 W. R., Cr., 69. In Bombay, where a jury failed to return their report within the prescribed time, but subsequently to such time made their report, finding that the obstruction complained of was not, as alleged, in a public thoroughfare, and the Magistrate, treating the report as of no value by reason of its not having been returned in time, issued an order requiring the person to whom the original order was issued to remove the obstruction within fifteen days,—it was held, that the Magistrate ought not to have proceeded to enforce this order. The framers of the Code, it was said, "evidently contemplated that considerations of justice and equity should form the rule of a Magistrate's conduct in dealing with alleged nuisances or unlawful obstructions . . . The Legislature apparently relied on the sense of justice and discretion of the District Magistrate to remedy any failure of duty on the part of the jury either by an extension of the time fixed for their decision, or by a further reconsideration of the subject."—*Reg.* v. *Dalsukram Haribhai*, 2 Bom. H. C. R., 407, 411.

For form of Magistrate's order constituting a jury, see Sched. V, No. 17.

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139. If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification (if any).

Procedure where jury finds Magistrate's order to be reasonable.

In other cases, no further proceedings shall be taken.

See s. 523, para. 3, and s. 526, para. 1, of Act X of 1872.

In the case of *Petumber Jugi* v. *Nasaruddy*, 25 W. R., Cr., 4, only two of the alleged majority of three (in a jury of five) went and saw the place, and the third formed his opinion solely on what had been told him by the other two. It was held that the majority was not a legal majority. GLOVER, J., said: "The law requires a juryman to exercise his own understanding on the case submitted to him, and to decide on evidence. Here the third juryman did neither. He followed blindly the opinion of his fellows without exercising any discretion of his own." But where a party objects to the verdict of a jury, he ought to give the Magistrate reasonable *primâ facie* ground for the opinion either that the jury did not in fact apply a judicial discretion to the case, or that the verdict was such as a jury could not have arrived at by a proper exercise of their discretion upon the materials before them.—*Bindabun Chunder Dutt* v. *Dwarka Nath Sen*, 23 W. R., Cr., 15.

The powers embodied in sections 133—9 with regard to the obstruction of public ways are not intended to be exercised where there is a *bonâ fide* dispute as to the existence of the public right. Where there is such a dispute, the Court should pass no order under these sections until the public right has been established by proper legal proceedings, civil or criminal.—*Basaruddin Bhinah* v. *Baha Rali*, I. L. R, 11 Calc., 8.

A Magistrate is bound to be guided by the decision of the jury, but if their meaning is not clear, he may call upon them to find expressly whether the order was reasonable and proper or not.—*Reg.* v. *Poholee Mullick*, 1 W. R., Cr., 28. See further note to preceding section.

140. When an order has been made absolute under section 136, section 137, or section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code.

Procedure on order being made absolute.

If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found.

Consequences of disobedience to order.

140. A notice under s. 140 of P.C should be drawn up, calling upon or requiring the person against whom a proceeding is to be drawn up under sec 133 Cr P.C." to remove the nuisance complained of" or in other words to take such steps as would result in the subject matter of the complaint ceasing to be a nuisance to the public.

In the matter of Indiana th Banaji
2. C. W. N. LXXXIX

No suit shall lie in respect of anything done in good faith under the section. Ch. X s. 141

See s. 525 and s. 526, paras. 1 and 2, of Act X of 1872.

Section 188 of the Indian Penal Code is as follows:—"Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

"*Explanation.*—It is not necessary that the offender should intend to produce harm or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces or is likely to produce harm."

Where a party objects to the verdict of a jury, he ought to give the Magistrate reasonable *primâ facie* ground for the opinion either that the jury did not in fact apply a judicial discretion to the case, or that the verdict was such as a jury could not have arrived at by a proper exercise of their discretion upon the materials before them.—*Bindabun Chunder Dutt* v. *Dwarka Nath Sen*, 23 W. R., Cr., 15.

Good faith.—According to s. 52 of the Indian Penal Code, "nothing is said to be done or believed in good faith, which is done or believed without due care and attention." See *Sheo Surn Sahai* v. *Mahomed Fuzil Khan*, 10 W. R., Cr., 20; *Nilkanthapa Malkapa* v. *Magistrate (First class) in charge of the Sholapur Taluka*, I. L. R., 6 Bom., 672; and *Balaram* v. *Magistrate in charge of Taluk Igatpuri*, I. L. R., 6 Bom., 672.

No order made under s. 133 by a Magistrate can be called in question by a Civil Court, even on the ground that it was made without jurisdiction, as where it is alleged that the land in respect of which an order was made was private property, and not a thoroughfare or public place.—*Mutty Ram Sahoo* v. *Mohi Lall Roy*, I. L. R., 6 Calc., 291; (S. C.) 7 C. L. R., 433; see *Rooke* v. *Peari Lall*, 3 B. L. R., Appx., 3; (S. C.) 11 W. R., 434. But where an order has been made, *e.g.*, for the removal of an obstruction or nuisance from a particular place, it is competent to a Civil Court, irrespective of such order, to try the question whether the place is private property and not a public way or public place.—*Mutty Ram Sohoo* v. *Mohi Lall Roy*, I. L. R., 6 Calc., 291; (S. C.) 7 C. L. R., 433, *per* FIELD, J.; see *Goordo Pershad Roy* v. *Probhoo Ram Chuttopadhya*, 19 W. R., 426; *Reg.* v. *Bolton*, 1 Q. B., 66; *Brittain* v. *Kinnaird*, 1 B. and B., 432.

The persons aggrieved by an order under this chapter can sue the parties who instituted the proceedings before the Magistrate for damages only, where they can show that, in taking such proceedings, they were actuated by malicious motives, or intended wrongfully to injure.—*Chintamani Bapooha* v. *Digambar Mitter*, 2 B. L. R. (S. N.), xv, *per* PHEAR and HOBHOUSE, JJ.

For form of Magistrate's notice and peremptory order after the finding by a jury, see Sched. V, No. 18.

Procedure on failure to appoint jury or omission to return verdict.

141. If the applicant, by neglect or otherwise, prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks

Ch. X secs. 142-143 fit, and such order shall be executed in the manner provided by section 140.

This section corresponds generally with s. 523, para. 4, of Act X of 1872.

Whenever, for any cause, the constitution of the jurors is changed, and a fresh juror is appointed, the Magistrate must fix a time within which their award is to be made —*In re Shama Kant Bundopadhya*, 14 W. R., Cr., 69.

See the remarks of the Court in *Dalsukhram* v. *Hari Bhai*, 2 Bom. H. C. R., 411, where the report of the jury was returned after the original time fixed, and the Magistrate made an order disregarding the finding therein. See also notes to the preceding sections.

142. If a Magistrate making an order under section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made as is required to obviate or prevent such danger or injury.

Injunction pending inquiry.

In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

This section corresponds generally with s. 528 of Act X of 1872.

No order could be made, it was held, under s. 528 of Act X of 1872, unless there was imminent danger or fear of injury of a serious kind to the public involved in the case; and where a Magistrate, who had made an order under s. 521 of the former Code, subsequently directed further inquiry to be made, it was held that he must be considered to have abandoned his proceedings under the former section, and that he ought to have proceeded under s. 525 (ss. 136 and 137 of this Act), instead of fining the party charged under s. 188 of the Penal Code.—*Reg.* v. *Brojendro Lall*, 21 R., Cr., 86.

So, in the case of *Reg.* v. *Rajah Indoobhooshun Deb Roy*, 1 W. R, Cr., 8, it was held, that a Magistrate is only authorized to take immediate measures to prevent imminent danger pending the inquiry of a jury, but not where no jury has been appointed and after the danger has passed away.

Good Faith.—As to what is good faith, see note to s. 140, *supra*.

For form of injunction to provide against imminent danger pending inquiry by jury, see Sched. V, No. 19.

143. A District Magistrate or Subdivisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law.

Magistrate may prohibit repetition or continuance of public nuisances.

This section corresponds with s. 519 of Act X of 1872.

Under that section the persons competent to act were "a Magistrate of the District, a Magistrate of a Division of a District, or any Magistrate specially em-

Chapter XI [illegible] ...ing of some kind
with the land its[illegible] thing created or standing
upon it and [illegible] the prevention or
direction by prompt [illegible] of some definite act on the
part of an individual so that injury or nuisance
may not be caused [illegible]

powered." As to Magistrates empowered in Bombay to act under the corresponding section of the former Code, see *Bom. Gazette*, 1872, p. 1325; *Ibid*, 1873, p. 16. Ch. XI s. 144

Before a person can legally be punished for disobedience to an order under this section, some evidence must be taken that he has disobeyed the order of the Magistrate, and that such disobedience had produced, or was likely to produce, harm.—*Reg.* v. *Shabuckram Bukoolee*, 2 W. R., Cr., 32. The section contemplates an order addressed to a particular person.—*Empress* v. *Jokhu*, I. L. R., 8 All., 99. See note to next section.

By s. 268 of the Indian Penal Code "a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage." And by s. 291 of the Indian Penal Code, "whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both." In order to support a conviction under that section, there must be proof of an injunction to the accused individually against repeating or continuing some particular public nuisance.—*Empress* v. *Jokhu*, I. L. R., 8 All., 99.

A suit will not lie in a Civil Court to question an order made by the Magistrate directing the discontinuance of a nuisance.—*Bakas Ram Suhoo* v. *Chummun Ram*, 7 W. R., Civ., 11.

For form of Magistrate's order prohibiting the repetition, &c., of a nuisance, see Sched. V, No. 20. See also s. 176.

If any Magistrate, not being empowered in this behalf, prohibits the repetition or continuance of a public nuisance, his proceedings are void.—s. 530 (*h*), *infra*.

Orders made under this section are not proceedings within the meaning of s. 435, *infra*.

CHAPTER XI.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE.

Power to issue order absolute at once in urgent cases of nuisance.

144. In cases where, in the opinion of a District Magistrate, a Subdivisional Magistrate or of any other Magistrate specially empowered by the Local Government or the District Magistrate to act under this section, immediate prevention or speedy remedy is desirable,

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession, or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, or danger to human life, health or safety, or a riot or an affray.

An order under this section may in cases of emergency, or in cases where the circumstances do not admit of the serving

Ch. XI s. 144 in due time of a notice upon the person against whom the order is directed, be passed *ex parte.*

An order under this section may be directed to a particular individual or to the public generally when frequenting or visiting a particular place.

Any Magistrate may rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor in office.

No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs.

This section reproduces s. 518 of Act X of 1872, with certain alterations and additions.

The last clause of the section is new. It seems to have been suggested by the Full Bench case of *Gopi Mohun Moulik* v. *Taramoni Chowdhrani*, I. L. R., 5 Calc., 7; (S. C.) 4 C. L. R., 309. There an order by a Magistrate prohibiting one of two rival haut proprietors from holding for the future his haut on Tuesdays and Fridays, was held to be an order in the nature of a perpetual injunction, and therefore made without jurisdiction.

Presidency Towns.—It will be observed that this section does not apply to Presidency Magistrates. District Magistrates, Subdivisional Magistrates, or other Magistrates specially empowered by the Local Government or District Magistrates only are authorized to act under the section.

If a Magistrate not empowered in that behalf makes an order under this section, such order will be void.—s. 530 (*i*).

The section is to be resorted to only where a "speedy remedy is desirable." This is in accordance with Explanation I to s. 518 of Act X of 1872.

The provision making it necessary that the order should contain a statement of the material facts of the case, is new. It is in accordance with the opinion expressed by PHEAR, J., in the case of *Hari Mohun Malo*, 1 B. L. R. (A. Cr.), 20. To sustain a charge under s. 188 of the Indian Penal Code, the order must be in writing.—*In re Pitamber Dey*, 17 W. R., Cr., 57. The provision as to the manner of serving the notice is also new.

A power not contained in the former Code is given by the section to any Magistrate, enabling him to rescind or alter any order made under the section by any other Magistrate subordinate to him. It follows the ruling in the case of *Mohun Sirdar* v. *Obhoy Churn Mookopadyah*, 13 W. R., Cr., 72, where it was held that a Magistrate who had passed an improper order acted rightly in recalling it.

A Magistrate's power to deal with public nuisances under this Chapter (XI) is only properly applicable to temporary orders in urgent cases. It is only in such cases that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual. In such emergent cases an order may, under this section, be directed to the public generally when frequenting or visiting a particular place to abstain from a certain act, but this provision does not apply to a proclamation directed, not to the public generally frequenting or visiting a particular place, but to a portion of the community.—*Empress* v. *Jokhu*, I. L. R., 8 All., 99.

An order to abstain from interference with the management, worship, or administration of a temple and its property is an order to abstain from a *certain act* within the meaning of the section.—*E. V. Ramanuja Jeeyarsvami* v. *V. Ramanuja Jeeyar*, I. L. R., 3 Mad., 354.

Procedure.—Under this section, as under the corresponding sections of the former Codes of Criminal Procedure, action may be taken, when, in the opinion of the Magistrate empowered to act under it, a speedy remedy is desirable. Under

An order forbidding a person who claimed an interest in certain properties from collecting any rent from the raiyats on the properties does not fall within § 144 Cr. P.C. Such an order if made is made without jurisdiction, and may be set aside under High Courts powers of revision conferred by § 43, and § 15 of the Charter Act.
Ananda Chandra Bhattacharjee v. Carr Stephen
I.L.R. 19 C 127.
See also Abayeswari Debi v. Sidheswari Debi I.L.R. 16 C.
Prosunno Kumar Chatterjee v. The Empress ~~I.L.R. 8 C~~
8 C.L.R. 231.

Jurisdiction
Where a subdivisional Magistrate, by a order purporting to have been made under sec 144 Cr. P. Code directed certain prostitutes and their zemindars under whom they held the land to remove the houses of the former from a particular site within 24 hours and to take up their quarters on the opposite side of a railway on the ground that the visitors to the prostitutes have to cross the railway lines and thereby their lives would be endangered and for the disobedience of the said order directed prosecution under sec 188 I.P.C.
Held :- that sec 144 Cr. P.C was not intended to apply to such cases and the orders referred to were ultra vires.
In the matter of the petition of
Bireswar Basu Mazumdar & others.
2 C.W.N. page 70.

the Code of 1861 it was held, that the Magistrate was not justified in taking proceedings on the mere report of a constable; but was bound in the first instance to take evidence, if necessary, on both sides.—*Reg.* v. *Bhyro Dayal Singh*, 3 B. L. R., App. Cr., 5; (S.C.) 11 W. R., Cr., 46. And under the Code of 1872 it was held, that, in the absence of circumstances which showed that a speedy remedy was necessary, and that the delay which would be occasioned by a resort to the procedure contained in other sections of that Code would occasion a greater evil than that which would be suffered by the person on whom the order might be made, the Magistrate had no power to act, and any order made by him might be set aside.—*In re Krishna Mohun Bysack*, 1 C. L. R., 58; *Banee Madhub Ghose* v. *Wooma Nath Roy Chowdhry*, 21 W. R., Cr., 21. Ch. XI s. 144

It is not necessary that the information on which a Magistrate acts under this section should be on record. The circumstances on which he is required to act are frequently such that action must frequently be taken upon oral information. *E. V. Ramanuja Jeeyar Svami* v. *V. Ramanuja Jeeyar*, I. L. R., 3 Mad., 354.

Jurisdiction.—A Magistrate can only interfere under this section in respect of immoveable property. Thus, he cannot make an order relating to the custody of a sum of money concerning which there is a dispute which may lead to a breach of the peace.—*Reg.* v. *Goluck Chunder Gooho*, 12 W. R, Cr., 38. His jurisdiction is further confined to cases where there has been annoyance or injury, &c., to any person lawfully employed, or danger to human life, health or safety, or when there is a probability of a riot or affray.—*Sreenath Dutt* v. *Unnoda Churn Dutt*, 23 W. R., Cr., 34. In a case of dispute between rival parties as to the payment of rents by tenants, a Magistrate has no power under this section to make an order that no rents shall be collected until such time as the right and title of both parties shall have been established by order of a competent Court.—*Prosunno Coomar Chatterjee* v. *Empress*, 8 C. L. R., 231.

In *Bradley* v. *Jameson*, 11 C. L. R., 414; (S. C.) I. L. R., 8 Calc., 580, an order made under this section was subsequently reviewed by the Magistrate who passed it. On the review he struck off the case, remarking that the order was bad, and referred the matter to his superior officer. The latter having declined to interfere, stating that he saw nothing illegal in the order, the Magistrate by an order revived his former order. The High Court held that there having been no fresh proceeding, the order reviving the other was bad.

The section has no application to cases which refer to collection of market-dues (*Reg.* v. *Subun Singh*, 23 W. R., Cr., 57); nor to a private dispute between two persons relative to a path.—*Nilkomul Mookhopadhya* v. *Anund Chunder Lushkur*, 19 W. R., Cr., 6.

In the absence of evidence showing that a riot or affray is likely to occur, the Magistrate is not competent to direct a person to remove a wall erected on land alleged to belong to another person.—*Radhakishore* v. *Giridharee Sahee*, 13 W. R., Cr., 19. In the case of *Goshain Luchmun Pershad Pooree* v. *Pohoop Narain Pooree*, 24 W. R., Cr., 30, it was held, that before a prohibitory order under s. 518 of Act X of 1872 could be made, there ought to be information and evidence before the Magistrate that the act prohibited was likely to cause a riot or affray, and that the stoppage of that act would prevent such riot or affray.

A Magistrate has no jurisdiction to make an order under this section merely for the protection of property. Such an order can only be made in order to prevent obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any persons lawfully employed, or danger to human life, health or safety, or a riot or an affray.—*In re Pryag Singh*, I. L. R., 9 Calc., 103.

The third clause of this section, which, in certain cases, authorizes the Magistrate to pass an order *ex parte*, seems to contemplate that, ordinarily, an order under the section should not be made without an opportunity being afforded to the person against whom it is proposed to make it, to show cause why it should not be passed. Under s. 62 of the Code of 1861 it was held, that a Magistrate could not pass an order without first calling on the defendant to show cause why the order should not be passed, and taking any evidence which the defendant might adduce.—*Rai Luchmeeput Singh*, 14 W. R., Cr., 17; *In re Harimohun Malo*, 1 B. L. R., App. Cr., 20; *Reg.* v. *Ram Chundra Mookerjee*, 5 B. L. R., 131.

By the last clause of the section no order shall remain in force for more than two months unless the Local Government otherwise directs. This clause, as already

Ch. XI s. 144 pointed out, appears to have been suggested by the case of *Gopi Mohun Moulik* v. *Taramoni Chowdhrani*, I. L. R., 5 Calc., 7; (S. C.) 4 C. L. R., 309, in which a Full Bench consisting of twelve Judges held, that an order in the nature of a perpetual injunction was without jurisdiction. In a subsequent case, an order directing one of two rival haut-proprietors to remove his haut to such a distance from the other so as to render it useless for the purpose for which it was established, was held to come within the purview of the decision in the case of *Gopi Mohun Moulik* v. *Taramoni Chowdhrani*, and to be without jurisdiction.—*Shurut Chunder Banerjee* v. *Bamu Churn Mookerjee*, 4 C. L. R., 410.

A Magistrate has no power under this section to issue an order which is by its very nature irrevocable, such as an order to cut down trees. All that he has power to do is to compel the owner of property "to take certain order with it."—*Uttam Chunder Chatterjee* v. *Ram Chunder Chatterjee*, 13 W. R., Cr., 72.

It was the intention of the Legislature to give the Magistrate full and ample powers to restrain any person from doing any act, or to command him to hold any property in his possession subject to any condition, whenever such Magistrate shall consider that such a course of procedure is likely to prevent, or even tends to prevent a riot or an affray. . . . . . It is quite within his power to modify the right of persons to enjoy their property in a lawful manner, at least for a temporary period, by imposing upon the owner of property such conditions as he, after taking into consideration all the facts and surrounding circumstances of each particular case, may consider necessary to prevent a riot or affray. Every individual right is, to a certain extent, subject to the general interest of society, and the Legislature has invested the Magistrate with powers sufficient to cover a case like the one mentioned in the order of reference.—*Bykuntram Shaha Roy* v. *Meajan*, 10 B. L. R., 434; (S. C.) 18 W. R., Cr. (F. B.), 47, *per* COUCH, C. J. In this case the Magistrate was held to have acted rightly in issuing an order, prohibiting a landholder from holding a haut on particular days. The decision in that case must now be read with reference to the last clause of this section and the case of *Gopi Mohun Moulik* v. *Taramoni Chowdhrani*, I. L. R., 5 Calc., 7; (S. C.) 4 C. L. R., 309. See *Bholanath Bose* v. *Komuruddin*, 20 W. R., Cr., 53. A Magistrate cannot interfere with the right of a landholder to establish hauts within his estate and to hold them on any day most convenient to him.—*Sheeb Chunder Bhuttacherjee* v. *Saadut Ally Khan*, 4 W. R., Cr., 12. Nor has he power to pass an order in the nature of an injunction warning owners of cattle to take proper care of them on pain of punishment in case of disobedience.—*In the matter of Amiraddi*, 3 B. L. R., App. Cr., 45; see *Reg.* v. *Mozafar Khalifa*, 9 B. L. R., Appx., 36.

A Magistrate cannot, in general terms, forbid two parties to use any musical instrument in the neighbourhood of each other, though he may forbid their doing so for the purpose of mutual annoyance.—*In re Ram Chunder Geer Gossain*, 6 W. R., Cr., 40. Where a Magistrate summarily directed the owner of a tank in the dry bed of a river to destroy the banks of the tank, on the ground that they were an obstruction to the public in the lawful enjoyment of the river, and that the stopping of the water interfered with the health of the public, and it appeared that the tank had been in the defendant's possession for six years, the High Court, under the circumstances, set aside the order.—*In re Gholam Durbesh*, 10 W. R., Cr. 36.

In the case of *Muthialu Chetti* v. *Bapun Saib*, I. L. R., 2 Mad., 140, an order passed by the Magistrate, directing that all music should cease when any procession is passing a certain place of worship was held to be *ultra vires*. The Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.) said:—"At times the rights of the several sects to the undisturbed exercise of their religious observances may come into conflict without any criminal intention. In such cases mutual toleration is and must be the only and the proper rule. It has thus to be determined how far the conflicting rights interfere with and necessarily modify each other. It is, on the one hand, a right recognised by law that an assembly lawfully engaged in the performance of religious worship and religious ceremonies shall not be disturbed. It is, on the other hand, a right recognised by law that persons may for a lawful purpose, whether civil or religious, use a common highway by parading it, attended by music, so that they do not obstruct the use of it by other persons. If persons passing in procession, attended by music, pass a place in which others are assembled and engaged in public worship which the music would tend to disturb, it is the duty of the persons composing the procession to refrain from such disturbance, but assemblies for purposes

of worship are held scarcely in any place at all hours, and generally at appointed hours, and therefore it is unnecessary that there should be a rule that persons should not at any time pass along a high road in the neighbourhood of a recognised place of worship if attended by music. If, indeed, the procession be of a religious character, the prohibition of it may be as real an interference with the free exercise of religion as in allowing it to proceed past an assembly engaged in worship attended with such circumstances as to disturb that worship, and if no religious procession is to be allowed to pass a recognised place of worship, whether persons are or are not at the time there assembled and engaged in religious worship, the members of a numerous sect might close every highway to the processions of a sect to which they are opposed by erecting in the neighbourhood of each highway a place of worship. Ch. XI s. 144

The law, in the restriction it imposes on processions of whatever character, does not go beyond the necessity. . . . . For the preservation of the public peace, he (a Magistrate) has a special authority,—an authority limited to special occasions. His first duty is to secure to every person the enjoyment of his rights under the law, and by measures of precaution to deter those who seek to invade the rights of others; but if he apprehends that the lawful exercise of a right may lead to civil tumult, and he doubts whether he has available a sufficient force to repress such tumult or to render it innocuous, regard for the public welfare is allowed to override temporarily the private right, and the Magistrate is authorized to interdict its exercise. The duration of this authority is co-extensive with the emergency that justified the exercise of the authority."

The duties of a Magistrate in cases where the public peace is likely to be disturbed by one sect attempting to disturb another using the public streets is fully discussed in *Sundram Chetti* and *Punnusami Chetti* v. *Reg.*, I. L. R., 6 Mad., 203, where the Court (TURNER, C. J., INNES and KINDERSLEY, JJ.) examined and approved the principles laid down in the case last quoted.

In dealing with the civil rights of a subject under s. 518 of Act X of 1872, it was said to be incumbent on the Magistrate to limit the operation of his order to such reasonable time as may be necessary to enable him to hold a full and sufficient inquiry as to whether the act prohibited is likely to cause a breach of the peace and is within or is in excess of the legal right of the person forbidden to do it; and, if necessary, to deal with the case under the other provisions of the Criminal Procedure Code, which enable him to meet cases of a probable breach of the peace.—*In re Abdool* v. *Lucky Narain Mundul*, I. L. R., 5 Calc., 132, *per* AINSLIE, J. Where an order on the face of it appears to have been made without jurisdiction, no subsequent explanation can make it valid.—*Ibid*, *per* BROUGHTON, J.

In the case of *Reg.* v. *Ramchundra*, 6 Bom. H. C. R., 36, an order under s. 62 of Act XXV of 1861 by a Magistrate, directing the hereditary priests of a temple to widen and heighten the doorway of the temple in order to prevent danger from overcrowding, was upheld.

Revision, etc.—Where an order is duly passed under this section, the High Court cannot interfere under s. 15 of the Charter Act.—*E. V. Ramanuja Jeeyarsvami* v. *V. Ramanuja Jeeyar*, I. L. R., 3 Mad., 354; *In re Chunder Nath Sen*, I. L. R., 2 Calc. (F. B.), 293; *Bradley* v. *Jameson*, I. L. R., 8 Calc., 580; (S. C.) 11 C. L. R., 414. But where an order is passed without jurisdiction, the High Court may set it aside.—*Gopi Mohun Moulik* v. *Taramoni Chowdhrani*, I. L. R., 5 Calc. (F. B.), 7; (S. C.) 4 C. L. R. (F. B.), 309; *In re Krishna Mohun Bysack*, 1 C. L. R., 58; *Banee Madhub Ghose* v. *Wooma Nath Roy*, 21 W. R., Cr., 26; *Chunder Coomar Rai* v. *Omesh Chunder*, 22 W. R., Cr., 78; *Sreenath Dutt* v. *Unnoda Churn Dutt*, 23 W. R., Cr., 34; *Goshai Luchmun Pershad Pooree* v. *Pohoop Narain Pooree*, 24 W. R., Cr., 30. In the case of *Kedarnath* v. *Rughoonath*, 6 N. W. P. H. C. R., 104, it was held that the legality of an order made by a Magistrate under s. 62 of Act XXV of 1861 might be questioned in a Civil Court.

In the case of *E. V. Ramanuja Jeeyarsvami* v. *V. Ramanuja Jeeyar*, I. L. R., 3 Mad., 354, where an order was passed under s. 518 of Act X of 1872 by a Magistrate after considering various magisterial orders, police reports, and complaints, restraining one of the parties from interfering with the management, worship or administration of the Nanguneri Matam and its appurtenant estates, INNES, J., said: "All that the High Court can do is to see that the Magistrate had jurisdiction to pass the order under s. 518 (144 of the present Code). If he had, there is no power of interference. It was contended there was no such emergency as to call for an order under s. 518, and that the order was bad, as being not confined to one

Ch. XII s. 145 act but extended to several acts. We think we must take the recitals in the order itself as sufficient to show that the Magistrate *bonâ fide* believed from information before him that the danger of a disturbance through the action of the petitioner was imminent."

It is to be borne in mind, however, that whenever it is sought to enforce orders by the infliction of penalties, it is open to Courts to step in and see whether the orders were properly made or not. It is also to be borne in mind that, although the Criminal Procedure Code contains provisions for the removal of obstructions in public thoroughfares by summary proceedings before a Magistrate, there is nothing in these provisions which deprives a private individual of the redress which the law affords him under such circumstances by means of a civil suit.—*Ramkoomar Singh* v. *Sahebzada Roy*, I. L. R., 3 Calc. (F. B.), 20.

Orders made under this section, it is to be observed, are not proceedings within the meaning of s. 435, *infra*.

For form of Magistrate's order to prevent obstruction, riot, etc., see Sched. V, No. 21.

CHAPTER XII.

DISPUTES AS TO IMMOVEABLE PROPERTY.

Procedure where dispute concerning land, &c., is likely to cause breach of peace.

145. Whenever a District Magistrate, Subdivisional Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any tangible immoveable property, or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court, in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

Inquiry as to possession.

The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties is then in such possession of the said subject.

Party in possession to retain possession until legally evicted.

If the Magistrate decides that one of the parties is then in such possession of the said subject, he shall issue an order declaring such party to be entitled to retain possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction.

Nothing in this section shall preclude any party so required

sections 145 & 146 deal with the possession of property and are sections which may be appropriately referred to where it is desired to prevent interference of one party with the cultivation apparent by another and matters of that kind.
Annadach Bhattacharjya v. Pran Stephen I.L.R. 19 C. 12

"Parties concerned" [illegible] "parties concerned" in section 145 of the [illegible] do not necessarily mean only the persons [illegible] and includes also persons who [illegible] claiming a right to the property in dispute.
Though in [illegible] section 145 the evidence is to be recorded [illegible], it is the duty of the magistrate to issue processes for the attendance of such witnesses as the parties may desire to call, unless he can show good reasons for not doing so.
Ramchandradas v. Monohar Kundy I.L.R. 21 C. 29

"Parties concerned" — Held by Petheram C.J. and Trevelyan that "parties concerned in the dispute" meant "parties concerned at that time", there was no power in such a proceeding to introduce parties who were not concerned in the original dispute. Per Rampini J. dissenting. The preliminary proceeding under § 145 of the Code may and in many cases must partake of the character of a general citation to all the parties concerned in the dispute to appear and it is not necessary for the Magistrate to confine his final order as to possession to the parties whom he may have named in the preliminary proceeding. The magistrate had power to substitute the name of third persons without commencing the proceeding de novo.
Bechu Sheikh v. Deb Kumari Dasi
I.L.R. 21 Cal 407.

§145. Parties bound by order ——

Orders passed under § 145 are binding on the actual parties to the cases in which they are made.
Queen Empress v Kuppayyar

to attend from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed. Ch. XII s. 145

This section corresponds generally with s. 530 of Act X of 1872.

While the corresponding section of the former Act applied to cases where a Magistrate was satisfied that "a dispute likely to cause a breach of the peace exists concerning land or the boundaries of any land, or concerning any houses, water, fisheries, crops or other produce of land," this section embraces a similar dispute "concerning any tangible immoveable property or the boundaries thereof." Under the former Act the Magistrate was required to record a proceeding, stating the grounds on which he was satisfied of the likelihood of a breach of the peace and to call upon the parties to attend before him. The present section directs that the grounds on which the Magistrate is so satisfied and the requistion to the parties to attend shall be embodied in the same order.

The direction in the second paragraph to the Magistrate to peruse the statements put in by the parties, which is more precise in the procedure laid down than in the corresponding paragraph in s. 530 of Act X of 1872, is new.

The last paragraph of the section is also new.

The object of this section is to prevent a breach of the peace by retaining in possession the party already there, until such time as the Civil Court can pronounce on the two conflicting claims. In the mofussil, when a dispute arises as to land, too frequent resort is had to the provisions of this section, each party being anxious to have an order declaring himself to be in possession as against the other, so as to force him to prove his title as plaintiff in a civil suit. Before instituting proceedings, therefore, it is the duty of the Magistrate to satisfy himself that there is really a dispute likely to cause a breach of the peace. In fact, a Magistrate cannot be too careful in acting so as to guard against the danger of assuming jurisdiction in cases not really contemplated by the section, where the suggested apprehension is little more than colourable and made to induce the Court to deal with matters properly cognizable by the Civil Courts. See *In re Obhoy Chundra Mukerjee* v. *Mahomed Sabir*, 13 C. L. R., 410; (S. C.) I. L. R., 10 Calc., 78, where the decree of the Civil Court has been passed, the right as between the litigants is decided, and there is no more place for a summary order which proceeds, not upon title, but mere possession.—*Raneegunge Coal Association* v. *Hem Lall Ghatwal*, 24 W. R., Cr., 17. See *Rai Mohun Roy* v. *Wise*, 16 W. R., Cr., 24; *In re Gobind Chunder Moitro*, I. L. R., 6 Calc., 835; (S. C.) 8 C. L. R., 217.

It is the likelihood of a breach of the peace and the necessity for immediate action which alone warrant action by the Magistrate under this section.—*In re Kumund Narain Bhoop*, I. L. R., 4 Calc., 650; (S. C.) 4 C. L. R., 551. And where there is no present danger of a breach of the peace, the fact that a breach of the peace is likely to take place at a future time will not justify a Magistrate in making an order under the section.—*In re Umachurn Santra*, 7 C. L. R.,, 352; but see *Reg.* v. *Mohesh Chunder Roy*, 24 W. R., Cr.., 67. So it is not sufficient to justify a Magistrate in interfering that it is *probable* that a breach of the peace may occur if proceedings be not taken; but he must be satisfied that there exists a dispute which is *likely to induce a breach of the peace.*—*Damodur Biddyadhur Mohapatro* v. *Syamanund Dey*, I. L. R., 7 Calc., 385; (S. C.) 8 C. L. R., 514; see the cases there cited, and also the case of *In re Obhoy Chundra Mukerjee* v. *Mahomed abir*, 13 C. L. R., 410; (S. C.) I. L. R., 10 Calc., 78.

The holding of an inquiry under this chapter is a matter entirely within the discretion of the Magistrate of the District or of a Division of a District, and the High Court has no authority to require him to proceed under this chapter. The taking of security for keeping the peace is also a matter within the discretion of the Magistrate, provided he has materials upon which to proceed.—*Kali, Prosunno Roy*, 23 W. R., Cr., 58.

Procedure.—In the case of *Hurendro Narain Singh*, I. L. R., 11 Calc., 762, Prinsep and Grant, JJ., held, that proceedings under this section should, on all points of procedure, be regarded as summons cases, and that although it is discretionary with a Magistrate to issue a summons on a witness in such a case, yet, when any one of the

Ch. XII. s. 145 parties applies at a proper time for process to secure the attendance of his witnesses, the Magistrate should not arbitrarily refuse his assistance; but where such refusal is made, it is incumbent on the Magistrate to record his reasons for refusing. But it must be borne in mind that s. 356, *post*, provides, that in all inquiries under this chapter the evidence of each witness must be taken down in the writing and language of the Court by the Magistrate, or in his presence and hearing, and under his personal direction and superintendence, and signed by the Magistrate. Section 355, *post*, deals with the manner in which the evidence in summons cases must be taken.

Jurisdiction.—It was held that a Bench of Magistrates had no power to deal with cases coming under s. 530 of Act X of 1872.—*Sufferuddin* v. *Ibrahim*, I. L. R., 3 Calc., 754. Now, by s. 15, *supra*, it is provided that the Local Government may invest a Bench of Magistrates with any of the powers conferred or conferrible by or under this Code on a Magistrate of the first, second, or third class, and direct it to *exercise* such powers in such cases or such classes of cases only, and within such local limits, as the Local Government thinks fit; and except as otherwise provided by any order of the Local Government, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any of its members who is present taking part in the proceedings as a member of the Bench belongs, and, as far as possible, shall, for the purposes of this Code, be deemed a Magistrate of the first class.

It has been held, in many cases, that the grounds for the Magistrate's belief as to the existence of the likelihood of a breach of the peace must be recorded.—*In re Kumund Narain Bhoop*, I. L. R., 4 Calc., 650; (S. C.) 3 C. L. R., 551; and that, unless the proceedings recorded by the Magistrate under this section are based upon materials which disclose sufficient ground for considering that a breach of the peace is imminent, the order calling upon the parties to attend in Court may be set aside as without jurisdiction.—*Chunder Madhub Ghose* v. *Juggut Chunder Sen*, 4 C. L. R., 483; *Budhu* v. *Empress*, Punjab Rec., 1885, p. 17; *Sheikh Munglo* v. *Durga Narain Nag*, 25 W. R., Cr., 74. In the last mentioned case, the Court dissented from the decision in the case of *Gour Mohun Majee* v. *Doolubh Majee*, 22 W. R., Cr., 81, where it was laid down that when a person summoned to answer to a charge of criminal trespass appeared and filed a written statement, and the Magistrate proceeded accordingly without recording a proceeding under s. 530 of Act X of 1872, the irregularity was covered by s. 283 (s. 537 of this Act), the rule therein laid down being intended to extend to all proceedings before a Magistrate. See *In re Kishoree Mohun Roy*, 19 W. R., Cr., 10; *Raja Run Bahadur* v. *Ranee Tilessuree Koer*, 22 W. R., 79.

While, in the case of *Harvey* v. *Brice*, 4 W. R., 26, it was held that the omission on the part of a Magistrate to record a proceeding in a case of disputed possession of land was not a mere informality in procedure, but rendered the whole of his proceedings illegal, in another case, under the Code of 1861, it was considered that the omission to record a preliminary order stating that the Magistrate was satisfied that a dispute likely to induce a breach of the peace existed, did not invalidate an order passed, unless it could be shown that the party was not prejudiced by the omission.—*Mad. H. C. Pro.*, *9th August* 1870, *Weir*, p. 26. So, where a Magistrate had the report of a Police-officer before him, it was held that the omission to record a proceeding, though a technical irregularity, was not sufficient to warrant interference with his final order.—*In re Mussamut Zuhoorun*, 2 Wym. Cr. Rul., 1. The later cases, however, quoted below seem to show that the omission is not a mere technical irregularity.

When the contending parties are admittedly in joint possession of disputed lands, it was held, under the former Code, that the Magistrate has no jurisdiction to determine whether one of them might make use of the land in such a manner as to cause annoyance to the other.—*In re Rajkoomar Singh*, 2 C. L. R., 62.

Tangible Immoveable Property.—Section 530 of Act X of 1872 was held not to refer to a dispute as to the right to collect the rents of a joint undivided estate in a certain proportion.—*Ramrunginee Dossee* v. *Gooroodass Roy*, 18 W. R., Cr., 36; see *Beni Narain* v. *Acharj Nath*, I. L. R., 5 All., 607; nor to disputes as to what collections one of the parties has made, and what rents he is entitled to collect under a decree.—*Puddomonee Dossee* v. *Juggodumba Dossee*, 25 W. R., Cr., 2.

CRIMINAL PROCEDURE CODE (ACT X OF 1882), s. 145—*Breach of the peace —Record of grounds for Magistrate taking proceedings under section* 145—*Notice to parties—Sessions Judge not empowered to order proceedings under section* 145—*Parties claiming to be in possession of land, subject of dispute, rights of, to appear in proceedings.*] To justify the initiation of proceedings under section 145, Criminal Procedure Code, it is not sufficient that, in the course of a trial, it should appear from the statement of a witness examined that a breach of the peace is likely to ensue in consequence of a dispute regarding land. Before taking action, the Magistrate is bound to be satisfied from a police report or other information on this point, and he is also bound to make an order in writing stating the grounds of his being so satisfied, and this must be served on the parties to the dispute, for it is the intention of the law, not only that Magistrates should have sufficient grounds for proceeding under section 145, but that they should inform the parties concerned of the grounds on which they are proceeding. A Sessions Judge is not competent to order a Magistrate to take action under section 145. He should rather draw his attention to the nature of the dispute in the trial before him, so that the Magistrate may exercise his own discretion as to the necessity of proceedings. Proceedings so initiated, when there is nothing in the police report or elsewhere to justify them, would be void, and section 537, Criminal Procedure Code, would have no application. *Gour Mohan Majee* v. *Doollubh Majee*, 22 W. R. Cr., 81, dissented from ; *Dhanput Singh* v. *Chatterput Singh*, I. L. R., 20 Calc., 513, followed. Parties who, though not actually involved in the dispute, claim to be in possession of lands which are the subject of proceedings under section 145, should not be shut out from giving evidence in support of their claims. To do so would undoubtedly occasion very serious prejudice and interference with any possession which they might be able to establish.

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So a dispute between a zemindar and his lessee as to the right to receive rent was held by the Madras High Court not to be within the meaning of s. 530. —*Mad. H. C. Pro.*, 11*th February*, 1873, *Weir*, p. 27. It was, however, held in *Sutherland* v. *Crowdy*, 18 W. R., Cr., 11; (S. C.) 9 B. L. R., 229; *Hudrah Narain Singh* v. *Luchmi Bux Roy*, 5 C. L. R. (followed in *Narain Das* v. *Empress*, Punjab Rec., 1884, p. 35) and other cases, that the right to collect rents from ryots did come within the purview of s. 530 of Act X of 1872. The present section, as already pointed out, deals not with disputes "concerning any land or the boundaries of any land or concerning any houses, water, fisheries, crops or other produce of land," but only with disputes "concerning any tangible immoveable property or the boundaries thereof," and it has been held that a dispute as to the rights to collect rents is a dispute concerning tangible immoveable property within the meaning of this section.—*Pramatha Bhusana Roy* v. *Doorga Churn Bhuttacharjee*, I. L. R., 11 Calc., 413. In that case an opinion was expressed that a dispute as to *a julkur* or right of fishery was not a dispute concerning tangible immoveable property; and in the case of *Krishna Dhone Dutt* v. *Troilakia Nath Biswas*, I. L. R., 12 Calc., 539, it was actually held that it was not such a dispute.

Contents of order.—The order as to the grounds on which the Magistrate is satisfied as to the likelihood of a breach of the peace, prescribed by this section, should plainly state the grounds of the Magistrate's being satisfied that a dispute likely to induce a breach of the peace exists concerning certain specified land within his jurisdiction. Information must be referred to, and facts must be stated, by the Magistrate as facts believed to exist by him, such as to afford on the face of the roobokaree rational grounds for the belief that a dispute likely to induce a breach of the peace existed with regard to certain specified property. In arriving at an opinion with regard to the facts which the Magistrate gives as the ground of his belief, he must form his judgment by the exercise of a judicial discretion upon some sort of materials. The Code does not limit those materials to evidence given on oath, excepting that they must appear to be materials such as would justify a judicial officer in relying upon them. Unless the Magistrate is in a position in this way to present clear and rational grounds capable of being estimated according to their merits, on the mere statement of them he has no legal foundation on which to base his investigation *inter partes* relative to possession—*In re Kishoree Mohun Roy*, 19 W. R., Cr., 10; see *In re Sabhee Singh*, 6 W. R., 50; *Dewan Elahee Newoz Khan* v. *Jukrarunnissa*, 5 W. R., Cr., 14; (S. C.) 1 Wym, Cr. Rul., 17.

In the case of *Bisseshur Narain Mahtah*, Petitioner, 8 W. R., Cr., 83, distinguishing *Amrit Nath Jha* v. *Ahmed Reza*, 6 W. R., Cr., 61, it was considered that the provisions of this section had been substantially complied with when the Magistrate stated that there was a long standing dispute which was likely to induce a breach of the peace, and recorded that, in his opinion, the only way of bringing that dispute to a satisfactory settlement was by proceeding under the section. See also *Duriao Singh* v. *Uma Proshad*, 24 W. R., Cr., 16.

In the case of *Govind Chunder Moitra* v. *Abdool Sayad*, I. L. R., 6 Calc., 835, (S. C.) 8 C. L. R., 217, the proceeding recorded by a Deputy Magistrate did not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question between *A* on the one hand and *B* and *C* on the other; nor did it set forth the grounds upon which he was satisfied that such a dispute existed. It was held, that the proceeding was defective. In the proceeding it appeared that the Magistrate referred to a police report, but although it was held that the report might be taken to be incorporated by reference, it was not sufficient to justify the order. See the remarks of FIELD, J., in that case.

In a subsequent case, however, where the Magistrate recorded the following words—"whereas from the police report a breach of the peace is probable"—the High Court, although it considered the record of the grounds for the proceeding was unsatisfactory, yet, inasmuch as the police report, which was held to be incorporated, showed grounds for apprehending a breach of the peace, held that the final order declaring one party in possession was not defective.—*In re Kali Kristo Thakur*, I. L. R., 7 Calc., 46; (S. C.) 8 C. L. R., 245.

A Magistrate cannot proceed under this section in a case of a dispute arising out of a right of succession to a muth and its appurtenances, but should apply to

Ch. XII s. 145 the Judge, under the provisions of Act XIX of 1841, to appoint a curator or make some order with regard to the property till the right of succession is determined.—*Reg.* v. *Sreeputt Giri Gossain*, 2 B. L. R., Ap. Cr., 27; (S. C.) 11 W. R., Cr., 23.

Where the rights of parties have been already determined in a civil suit—*Rai Mohun Roy* v. *Wise*, 16 W. R., Cr., 24; or even in registration proceedings—*Gobind Chundra Moitra* v. *Abdoul Sayad*, I. L. R., 6 Calc., 835; (S. C.) 8 C. L. R., 217, if a breach of the peace is still imminent, the Magistrate should bind over the parties to keep the peace.

Report or other information.—Under this section, as under the Explanation to s. 530 of Act X of 1872, the Magistrate may satisfy himself from a "police report or other information;" but under the latter section it was held that the written report of an ameen, who had been deputed to hold a local inquiry, was not sufficient by itself to justify proceedings under the section.—*Reg.* v. *Soumber Ahir*, 20 W. R., Cr., 57. Where, however, a Magistrate based his proceedings on the report of the police, which did not show that there was any collection of men on the part of the opposite party, the proceedings were quashed.—*Puddomonee Dossee* v. *Juggodumba Dossee*, 25 W. R., Cr., 2.

In deciding a dispute as to a right of water, as distinguished from a right of fishery, the Magistrate must follow the procedure required by this chapter. See *Reg.* v. *Ramnath*, 7 W. R., Cr., 45.

When a Magistrate has taken any evidence, he is not justified in refusing to proceed with the case, because the parties neglect to file written statements on the day fixed for filing the statement.—*In re Goluck Chunder Mytee*, 11 W. R., Cr., 9.

The Magistrate should be careful not to interfere in cases which are of a purely civil nature.—*Mad. H. C. Pro., 4th January and 15th May* 1869, *Weir*, p. 26.

Possession.—As to what is actual possession, there was some conflict of authority under the former Code.

In the case of *Haruck Narain Singh* v. *Luchmi Bux Roy*, 5 C. L. R, 287, it was held, that s. 530 of Act X of 1872 contemplated disputes between owners as well as occupiers. Jackson, J., said:—It seems to me clear that when a zemindar has let his lands or portion of them in farm, he, his farmers, and the occupying ryots are all in their degree concerned in any dispute as to possession which may arise, and that they may and ought to be respectively maintained in possession of the interests which they severally enjoy.—*Sutherland* v. *Crowdy*, 18 W. R., Cr., 11. "There may be cases," said Couch, C. J., "in which a person would properly be said to be in possession, although there was no bodily possession by him. There is the case of a servant being in possession, and it may be said that when the servant is in possession, it is the possession of the master. So also, if an occupier is paying rent, that is the possession of the landlord to whom he pays the rent. For some purposes the occupier has a possession; he has a possession which would enable him to bring a suit against a person who wrongfully disturbed him in his occupation; but still his possession is the possession of him by whose permission, either given by a lease or any other mode of letting, he holds the land and to whom he pays the rent." See *In re Jitbahan* v. *Bansrup Dhobi*, 6 C. L. R., 193, where it was held that it was improper to make an order against one who was acting merely as the servant of another who claimed to be in possession, unless that other person were made a party to the proceedings. In a recent case it was decided that, in a dispute between two rival zemindars, constructive possession through intermediate holders, ticcadars, to whom the ryots paid their rents, was not such possession as could be dealt with under s. 530 of Act X of 1872.—*Empress* v. *Thacoor Dyal Sing*, I. L. R., 3 Calc., 320. There Ainslie, J., said:—"No doubt it has been held that questions between zemindars as to the right of collecting rents directly from the ryots may be considered by Magistrates, and that this right of so collecting rent is in fact possession within the meaning of s. 530; but that does not apply where there is an intermediate holder who admittedly receives rents from the ryots" (p. 321). See the case of *Nobin Chunder Coondoo* v. *Jogendro Nath Bhuttacharjee*, 25 W. R., Cr., 18, where it was held that a Magistrate had power to determine questions of contested possession between parties who were not in immediate possession of the land in dispute, but claimed to collect rent from tenants who actually occupied it. See also *Mad. H. C. Pro.*, 13*th July* 1868, *Weir*, p. 26, where it was laid down that constructive possession through tenants was not actual possession for the purposes of the section.

Again it has been held, that the possession in regard to which the Magistrate's jurisdiction should be exercised must be of a real and tangible character. When a party claims, under a document or agreement, the right of doing certain things over a large extent of territory, the performance of acts under such alleged right in one portion of the ground over which the right extends, although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a civil suit, is not of itself a sufficient possession on which a Magistrate's order under this section may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession, though at variance with the right.—*Bejoy Nath Chatterjee* v. *The Bengal Coal Co.*, 23 W. R., Cr., 45.

The possession given by an ameen in a butwara is simply one of ownership and not of occupancy, and cannot, therefore, in proceedings under this section, be held to oust tenants occupying lands previous to such delivery of possession.—*Mackenzie* v. *Shere Bahdoor Sahi*, I. L. R., 4 Calc., 378. See *In re Juggodeshary*, 3 C. L. R., 94.

When there are sufficient grounds for apprehending a dispute in regard to lands or crops other than a dispute as to possession, the procedure prescribed for security to keep the peace in Chap. XI may be followed. See *In re Gobind Chunder Moitra*, I. L. R., 6 Calc., 835; (S. C.) 8 C. L. R., 217.

Notice.—The mere service of a notice upon a mofussil naib, who takes no steps whatever to consult his employer, or act under his directions, is not such a notice as is contemplated by this section.—*Ramrunginee Dossee* v. *Gooroo Dass Roy*, 17 W. R., Cr., 9.

The only parties entitled to notice are those concerned in the dispute.—*Gobind Chunder Ghose* v. *Anundo Chundra Sircar*, 18 W. R., Cr., 54; (S. C.) 9 B. L. R., Appx., 39. But there is nothing in the law which enforces the serving of notice upon all the co-sharers in an estate which may, in some shape or other, form the subject of litigation under this section.—*Ibid.* The Court held there, that it was not necessary to give notice to co-proprietors not concerned in the dispute. No order should be made against one who is acting as the servant of another person who claims to have possession of the land, unless that other person is made a party to the proceedings, and, *à fortiori*, it is improper to decide the matter in the absence both of the master and servant.—*In re Jitbahan* v. *Bansrup Dhobi*, 6 C. L. R., 193.

The notice must be a specific notice to the individuals interested in the dispute in consequence of which the proceedings have arisen, and not a general citation to the public.—*In re Rajah Kunund Narain Bhoop*, I. L. R., 4 Calc., 650; (S. C.) 3 C. L. R., 551; *In re Nobokishore Chuckerbutty*, 7 C. L. R., 291.

Intervenors.—There is no provision in the Code by which an intervenor can come in and claim possession of the property which is already the subject of proceedings under this section.—*In re Rajah Kunund Narain Bhoop*, I. L. R., 4 Calc., 650; (S. C.) 3 C. L. R., 551. But a Magistrate who has decided the question of possession is justified in preventing another person from entering upon the land. —*Queen* v. *Saadut Khan*, 3 W. R., Cr., 19.

Factum of possession.—Under the former Act, the possession regarding which parties were required to give proof, relating to a dispute as to land in respect of which a breach of the peace was apprehended, it was held, was possession at the time when the proceedings were instituted by the Magistrate, and not possession at the time the Magistrate came to his decision.—*In re Pirthiram Chowdhry Rai Bahadoor*, 20 W. R., Cr., 51; *Rakhal Dass Singh* v. *Rajah Sheo Persad Singh*, 24 W. R., Cr., 73. And this section seems by the use of the word "then" in the last line of the second paragraph to point specifically to the time when the Magistrate comes to a decision in the matter as the time with reference to which the fact of possession must be determined. The matter is now, however, concluded by authority, for, in the case of *Ambler* v. *Pushong*, I. L. R., 11 Calc., 365, TOTTENHAM and GHOSE, JJ., held, that, under this section, the Magistrate has to find which of the parties is in possession of the subject-matter of the dispute at the time when he is inquiring into the matter, which time in contemplation of the law is practically identical with the time of the institution of the proceedings, and not at any time previous thereto, and he has no concern as to how the party in actual possession obtained possession, but has only

Ch. XII s. 145 to pass an order retaining him in possession. The section, it was said, did not contemplate any change of possession pending the proceedings. That case was referred to and apparently followed in the case of *Krishna Dhone Dutt* v. *Troilokhia Nath Biswas*, I. L. R., 12 Calc., 539. There a petition was, on the 17th August, presented to the Magistrate, alleging that a breach of the peace was imminent in respect of a certain area of 105 bigahs forming a part of a large julkur called Narainpur Julkur, which was admittedly in the possession of certain persons who held under the petitioners. In that petition it was alleged that the respondents had excavated a khal or canal leading to the julkur, with the object of drawing off and catching the fish of the julkur. On the 23rd August, the embankment was cut by the respondents so as to effect a junction between the khal and the julkur, and on the 24th August the Magistrate made an order in writing, under s. 145 of the Code of Criminal Procedure, calling upon the parties concerned to put in written statements of their respective claims as regards possession of the 105 bigahs which formed the subject of dispute. On the 17th November the Joint Magistrate disposed of the matter in this way: He held that, as regards the 105 bigahs, no one was in possession on the 24th August, the date on which the Magistrate's order was made, and he accordingly attached so much of the julkur, but he found that the respondents having cut the embankment on the 23rd were in possession of that cutting on the 24th, and he, therefore, ordered them to be retained in possession of that cutting, till ousted by a decree of a Civil Court. It was held by the High Court that the inquiry in such cases should be directed to the question as to which party was in possession of the subject of dispute before any proceedings with Court had been taken in the matter. The judgment in the case is less precise than that in the case of *Ambler* v. *Pushong*, which was followed in the case of *Chunder Koomar Poddar* v. *Chundra Kanta Ghose*, I. L. R., 12 Calc., 521, but it was not apparently intended to lay down any different time with reference to which the inquiry as to possession should be. See *In re Prithuram Chowdhry*, 20 W. R., Cr., 5; and a Full Bench Ruling of the Madras High Court, *Weir*, 2nd Edn., p. 437. The case of *In re Mohesh Chunder Khan*, I. L. R., 4 Calc., 417, is hardly reconcilable with these cases.

A Magistrate's finding as to the point of actual possession under this section is conclusive in a civil suit.—*Lillu bin Raghushet* v. *Annaji Parashram*, I. L. R., 5 Bom., 387.

The Magistrate should inquire into the fact of possession only and decide accordingly. Therefore, where a Magistrate awarded absolute possession to a claimant who admitted that the defendant was in possession, and who only claimed a right of way over the land, his order was quashed.—*Queen* v. *Sagar Mahomed*, 1 W. R., Cr., 25. See *In re Juggodeshary*, 3 C. L. R., 94.

Where each of two parties claimed the same share of certain property as a whole estate, neither of them alleging that the other was joint with him in any way, and the Magistrate, without reference to the right of possession, went into the question of who was in possession, and maintained the possession of the party found in possession, the High Court declined to interfere.—*Byjnath Sahoo* v. *Rugoonath Pershad*, 25 W. R., Cr., 16.

Where a decree has been passed by a Civil Court, determining the rights of the parties to a suit to disputed land, it is a Magistrate's duty to uphold that decree, and he cannot, as between such parties, proceed under this section to decide afresh the question of possession.—*In re Bholanath Ghose*, 7 C. L. R., 516; *Rai Mohun Roy* v. *Wise*, 16 W. R., Cr., 24; *Raneegunge Coal Association* v. *Hem Lall Ghatwal*, 24 W. R., Cr., 17. So in the case of *Shama Soondery Debia* v. *Jardine, Skinner & Co.*, 6 W. R., Cr., 10, it was held, that a Magistrate ought not to interfere under this section with the execution of a decree of a Civil Court. If called upon to interfere at all, where a breach of the peace is apprehended, he should maintain in possession the person who has been actually put in possession by the decree of the Civil Court, for he is bound to maintain the party in possession who has obtained a decree from a Civil Court, and has no power to institute proceedings regarding the land covered by it.—*Rai Mohun Roy* v. *Wise*, 16 W. R., Cr., 24.

In *In re Chutraput Singh*, 5 C. L. R., 200, symbolical possession having been given of a mouzah, to which a haut appertained, which was sold in execution of a decree, the judgment-debtor refused to give up actual possession of

the haut, maintaining that it was debutter property, of which he was the shebait. A breach of the peace being imminent, proceedings were taken under s. 530 of Act X of 1872, and the Magistrate, finding that the judgment-debtor was in actual possession of the haut, made an order maintaining him in such possession. The High Court held, that the Magistrate had no power to make the order, but was bound to see that the possession as given by the Civil Court was maintained, leaving it to the debtor to substantiate his claim in a Civil Court. Ch. XII s. 145

When the rights of the parties have been determined in a civil suit, there is no longer a dispute within the meaning of s. 530, and it was held, that the proper course for a Magistrate to pursue, if the defeated party did any act which might probably occasion a breach of the peace, was to take action under s. 491 (corresponding with s. 107 of the Code), and require from such party security to keep the peace.—*In re Gobind Chunder Moitra*, I. L. R., 6 Calc., 835 ; (S. C.) 8 C. L. R., 217, *per* FIELD, J. See *Rai Mohun Roy* v. *Wise*, 16 W. R., Cr., 24. In the former case, certain registration proceedings, in which the question of possession had been decided, were pending, and proceedings were taken under this section. PONTIFEX, J., said: "In my opinion the fact that these registration proceedings were pending at the time the application was made for interference under the Criminal Procedure Code should have made the Deputy Magistrate extremely careful not to make any order as to possession under s. 530 (145), unless he was quite satisfied that a *bonâ fide* dispute existed, and that a breach of the peace was imminent. . . . It would have been quite sufficient if he thought a breach of the peace was imminent to bind over the leading ryots on either side. . . . . It was never intended that the provisions of s. 530 (145) should be used for the purpose of avoiding a decision so recently arrived at after a full trial." On the same point, FIELD, J., who referred to the case of *Rai Mohun Roy* v. *Wise*, 16 W. R., Cr., 24, remarked :—" When the rights of the parties have been determined, there is no longer a dispute within the meaning of the section ; and the proper course for a Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to require from such person security to keep the peace."

In the case of *Rai Mohun Roy* v. *Wise*, 16 W. R., Cr., 24, it was decided that when a decree had been passed by a Civil Court regarding land in dispute, it was the duty of the Magistrate to maintain it, and that he had no power again to institute proceedings regarding such land under this section of the Criminal Procedure Code. In the case of *Nobin Chunder Koondoo* v. *Jogendranath Buttacharjee*, 25 W. R., Cr., 18, on the other hand, it was laid down, that the mere delivery over of land to a purchaser at an execution-sale by the Civil Court peon did not take away the power of a Magistrate to inquire into the question of possession ; but in the case of *Chutraput Singh*, 5 C. L. R., 200, the Court refused to follow that case, which seems to be against the weight of authority.

In the case of *Sheikh Munglo* v. *Doorga Narain Nag*, 25 W. R., Cr., 47, it was said, that although symbolical possession is not entitled to weight as against a party proved to be in possession, yet, in the absence of evidence, it is in itself deserving to be taken into consideration.

In a recent case it was held, that a Criminal Court ought not to interfere in cases where a purchaser under a decree is resisted in getting actual possession of the property which he has bought, the procedure to be adopted in such cases, it was said, being that provided by Chap. XIX of the Civil Procedure Code (Act XIV of 1882).—*Prayag Singh* v. *Fuzool Hoossin*, 6 C. L. R., 206.

Evidence.—In determining the question of actual possession, it is necessary that evidence should be taken upon oath.—*Queen* v. *Kali Churn Shah*, 7 B. L. R., 322. A police report is not in itself evidence that a dispute likely to induce a breach of the peace exists (*In the matter of Bhadreswari Chowdhrani*, 7 B. L. R., 329), although it may be sufficient to justify the Magistrate taking action. The Magistrate must come to a judicial decision on the question, and for that purpose examine the witnesses tendered by the parties.—*Mussamut Anundee Kooer* v. *Ranee Soonaet Kooer*, 9 W. R., Cr., 64.

A Magistrate is empowered by s. 540, *infra*, to summon witnesses in cases under this section. See *Shama Sunkur Mozoomdar* v. *Ranee Anunddmoyee Dassya*, 18 W. R., Cr., 64.

An order for possession passed by a Magistrate on a perusal of evidence recorded

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by another Magistrate was held, under the former Code, to be illegal.—*Mad. H. C. Pro.*, *16th November* 1875, *Weir*, p. 26. See *Guruchurn Sen* v. *Kali Nath Dass Biswas*, 23 W. R., Cr., 62. These cases turned upon the wording of the explanation to s. 530, which has not been repeated in this Code. It would seem that, under s. 350, *infra*, an order might be passed under this section upon evidence recorded by another Magistrate. But a Magistrate must decide the fact of possession on evidence, and not according to the result of a local inquiry made under s. 148, unless the parties had consented to be bound thereby.—*In re Baikunt Kumar*, 3 C. L. R., 134.

In a case of disputed possession, it was held, that the Magistrate was wrong in not recording a sufficient proceeding showing the grounds upon which he was satisfied that the dispute was one likely to lead to a breach of the peace, and that if the parties consented to waive that point by consenting to go into the whole question, the Magistrate was wrong in taking the title of one person as *primâ facie* evidence of his possession, and throwing the *onus* on the other and precluding the other from proving his title.—*Amrithnath Jha* v. *Ahmed Reza*, 6 W. R., Cr., 61.

Where there has been substantial evidence of possession or a conflict of evidence on that question, the Magistrate is justified in looking to the evidence of title in combination with the evidence of possession.—*In re Kali Kristo Thakur*, I. L.R., 7 Calc., 45; (S. C.) 8 C. L. R., 244.

Where two investigations were before a Magistrate, who, after deciding one of the cases, remarked in the other, that, because the lands adjoined, he had taken the evidence in the two cases together, and found it unnecessary to continue the inquiry further, it was held that the parties kept out of possession were entitled to a full inquiry.—*Watson* v. *Ranee Surnomoyee*, 8 W. R., Cr., 63. But in the case of *Azim Mollah* v. *Sutoo Poramanick*, 10 C. L. R., 523, where there was a dispute as to the possession of 109 plots, all covered by the same state of circumstances, proceedings under the section were instituted in respect of all the 109 plots, but the Magistrate, after taking evidence in respect of 12 only, made an order, directing one party to be kept in possession of all the plots. It was objected that the Magistrate ought not to have included the 109 plots in one proceeding, and further, that evidence should have been taken in respect of each plot. The High Court, however, declined to interfere, being of opinion that, under the circumstances, the Magistrate had exercised a wise discretion in acting as he did.

The grant of a certificate under Act XXVII of 1860 is not proof of possession, nor does it entitle the holder to be put into possession of any property of a deceased person.—*Mussamut Anuragee Koowar* v. *Ramruchya Dass*, 25 W. R., Cr., 16; *Queen* v. *Sreeputt Giri Gossain*, 11 W. R., 23; (S. C.) 2 B. L. R., Ap. Cr., 27.

Orders as to possession.—It was doubted whether an order under s. 530 of Act X of 1872 could be directed to others than the unsuccessful party to the proceedings under the section; or whether such an order could properly be directed to the public at large.—*In re Nobo Kishore Chuckerbutty*, 7 C. L. R., 291.

A Magistrate has no authority to restore to possession a person alleged to have been illegally dispossessed. All that he can do in a dispute likely to lead to a breach of the peace is to follow the course prescribed by this section, and after inquiry declare the party whom he finds in actual possession entitled to retain possession until ousted by due course of law, and forbid all disturbance of such possession in the meantime.—*Ramjeebun Doobey* v. *Luchmonee Dabea*, W. R., Cr., Sup. Vol., 5. See, however, s. 522, *infra*, which is as follows: "Whenever a person is convicted of an offence attended by criminal force, and it appears to the Court that by such force any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, order such person to be restored to the possession of the same; no such order shall prejudice any right or interest to or in such immoveable property which any person may be able to establish by civil suit." See Specific Relief Act, I of 1877, s. 9.

In a dispute as to a right of way, the Magistrate should decide whether the complainant has been in use and occupation of the road, and, if so, for how long, and if he finds him to be in possession, should retain him in it, leaving the owner of the land to refer the question of right to the easement to the Civil Court. He should not decide against the complainant, because he may have another right of way leading to the same place.—*Queen* v. *Toylukonath Sircar*, 2 W. R., Cr., 64.

A Magistrate cannot order that a person be kept in possession until he has reaped the crop standing on the ground, and then order that he shall give it away to another.—*Bunwari Lall Misser* v. *Raja Radha Pershad Singh*, 1 C. L. R., 136. Ch. XII s. 146

A Magistrate who has found one party to be in possession has no power to give the opposite party found not to be in possession permission to cultivate the disputed land pending the decision of a possessory action.—*Shib Churn Chuckerbutty* v. *Ishen Chander Chuckerbutty*, 10 W. R., Cr., 27.

Any order under this section is of course binding only on the actual parties in the case before the Magistrate. So that, in a dispute between *A* and *B* and his tenants, where *A* was by an order declared to be in possession, subsequent tenants of *B* could not be criminally punished for disobeying the order.—*In the matter of Gopal Burnawar*, 3 B. L. R., Ap. Cr., 13. See *In re Nobo Kishore Chuckerbutty*, 7 C. L. R., 291.

Where a Magistrate thinks that the acts of the accused are such as may lead to a serious breach of the peace, and has ascertained that their statements as to their possession of the land are false, he may proceed to try whether the accused should not be charged with unlawful assembly.—*Emam Ali* v. *Sudderuddeen*, 9 W. R., Cr., 18.

In investigating a case of dispute as to land between two parties, a Magistrate found that one party was in possession, but there being a charge against both parties of rioting under s. 147 of the Penal Code, he punished both parties. It was held, that the party in possession was protected by s. 104 of the Penal Code in maintaining his possession, and the punishment inflicted on him was accordingly remitted.—*In re Toolsee Singh*, 10 W. R., Cr., 64.

Any order under this section ceases to have any effect when the party aggrieved by it obtains an order from the Civil Court declaring his rights as against such order.—*Rajcoomar Singh*, Petitioner, 2 C. L. R., 62.

On the death of one of the persons concerned in proceedings under this section, the Magistrate ought to postpone the proceedings and make his representative a party. Where, however, a party died just before the proceedings terminated in favour of him and another person, it was held that, inasmuch as the death had prejudiced no one, the order made was not bad.—*In re Sreemutty Ranee Anundomoyee Dabee* v. *Luchmun Persad Gogo*, 2 C. L. R., 264.

A Magistrate, who finds an order of his predecessor with regard to the possession of certain land has not been complied with, should maintain the possession which he finds, even if it is inconsistent with his predecessor's order, and should not take any steps in the matter unless some one actually in possession and guaranteed possession by the order comes to complain to him that his possession is threatened, or that he has been forcibly turned out, and asks in pursuance of the order to be maintained in possession.—*Queen* v. *Protab Chandra Baroonh*, 21 W. R., Cr., 2.

Costs.—See the provisions of s. 148.

Revision by High Court.—When a Magistrate decides on the evidence in favour of a party as being in possession of the disputed land, the High Court cannot reconsider the Magistrate's decision, and decide which party is in actual possession. —*Bharut Chunder Bose* v. *Dwarkanath Chowdhry*, 15 W. R., Cr., 86.

Proceedings under this section are judicial proceedings; see s. 4 *(d)*, *supra*; *Reg.* v. *Buloram*, 3 Wym. Cr. Rul., 37.

But an order by a Magistrate, under s. 518 of Act X of 1872 (s. 144 of this Code) upon information, and without any formal inquiry or taking of evidence, prohibiting a person from re-opening a haut, was held not to be a 'judicial proceeding,' and therefore could not be dealt with under s. 297 of Act X of 1872.—*Bholanath Bose* v. *Komuruddin*, 20 W. R., Cr., 53; *Arzanoollah* v. *Nazir Mullick*, 21 W. R., Cr., 22.

For form of Magistrate's order declaring a party entitled to possession of land, &c., in dispute, see Sched. V, No. 22.

Power to attach subject of dispute.

146. If the Magistrate decides that none of the parties is then in such possession, or is unable to satisfy himself as to which of them is then in such possession, of the subject of dispute, he may attach it

Ch. XII s. 147 until a competent Civil Court has determined the rights of the parties thereto, or the person entitled to possession thereof.

This section corresponds with s. 531 of Act X of 1872.

As to procedure, see note to preceding section.

Before passing an order under this section, a full inquiry should be held, the pre-requisite of the order being that the Magistrate is unable to ascertain the fact of possession.—*Mad. H. C. Pro.*, 28 *Nov.* 1870. In the case of *In re Ram Soondaree Dabee*, 1 C. L. R., 86, the High Court at Calcutta, in dealing with a case under s. 531 of Act X of 1872, also held, that it was only when, after recording a proceeding under s. 530, and taking evidence, a Magistrate decided that neither party was in possession, or was unable to satisfy himself as to which party was in possession, that he could under s. 531 attach land in dispute. See *In re Raja Leelanund Singh Bahadoor*, 1 C. L. R., 273; *In re Mukhoda Dossee*, 18 W. R., Cr., 4.

The power of attaching land under this section, it has been held, extends to disputes as to the possession of land of which rival zemindars are in possession by their ryots.—*In re Maseyk*, 15 W. R., Cr., 1. But in the case of *Ramdyal* v. *Chintamoonee*, W. R., Sup. Vol., Cr., 28, it was said, that where there is a dispute as to the actual possession of land, not between two co-proprietors, but between rival ryots, the Magistrate ought to settle the dispute, and not attach the land.

A Magistrate, it has been held, may lease land attached under this section.—*In re Greesh Chunder Doss*, 17 W. R., Cr., 38.

Where a Magistrate being doubtful as to which of two persons was the rightful owner of some disputed property, attached it in order to prevent a breach of the peace, and released it on the parties coming to an agreement, but subsequently reattached it on the appearance of a third claimant, from whose attempt to obtain possession a breach of the peace was apprehended,—it was held, that the Magistrate was only competent to order a fresh attachment after taking the preliminary steps under s. 530 of Act X of 1872 (s. 145 of this Code), if on completion of the inquiry he found himself in the position described in s. 531, and that if there was any new dispute, he ought to have proceeded *de novo*, but that the best course to pursue would be to exercise his powers under Chap. XXXVII (Chap. VIII of this Code).—*Queen* v. *Kaly Kishore Roy*, 25 W. R., Cr., 68.

A Deputy Magistrate, after issuing notices under s. 530 of Act X of 1872 to two parties, found himself unable to determine who was in possession, and attached the property. Upon this a third party represented that he as landlord had taken possession of the land on the death of the person to whom it had been leased. The Deputy Magistrate, however refused to remove the attachment, holding that the landlord's possession was without colour of law. The High Court held it was the duty of the Magistrate under the circumstances to have withdrawn the attachment, if he found that the third party was actually in possession.—*In re Joykissen Mookerjee*, 24 W. R., Cr., 40.

A Sessions Judge has no power to interfere with the order of a Magistrate attaching disputed land under this section.—*Hurronath Chowdhry* v. *Rajender Chunder Roy*, 15 W. R., Cr., 1.

A dispute between a zemindar and his lessee as to the right to receive rent is not within the meaning of the section.—*Mad. H. C. Pro.*, 11*th Feby.* 1873, *Weir*, p. 27.

As to costs, see s. 148, *infra*.

For form of warrant of attachment in the case of a dispute as to the possession of land, see Sched. V, No. 23.

Disputes concerning easements, &c.

147. Whenever any such Magistrate is satisfied as aforesaid that a dispute likely to cause a breach of the peace exists concerning the right to do or prevent the doing of anything in or upon any tangible immoveable property situate within the local limits of his jurisdiction, he may inquire into the matter; and may, if it

[illegible] possession of immoveable property, not appealable.
— Where a Deputy Magistrate, while convicting some of the accused of offences under sec 14[illegible] and others of offences under secs 148 & 326 [illegible] and sentencing them made an order under § 522 for restoration of [illegible] the S. Judge [illegible] while setting aside the conviction of the accused under secs 14[illegible] 148 [illegible] the order passed by the [illegible] under sec 522. Held that the order under § 52[illegible] [illegible] by the [illegible] [illegible] the [illegible] had no [illegible]

CRIMINAL PROCEDURE CODE *(Act X of 1882), section 147—Disputes concerning Easement—Procedure to be observed by Magistrate when dispute exists regarding an Easement—Parties entitled to notice.*] The enquiry contemplated under section 147 of the Code of Criminal Procedure is a judicial enquiry, and the opinion formed by a Magistrate must be a judicial one based on evidence legally recorded by him in the manner provided by section 356, and on due notice to the persons who respectively claim or deny the right, the subject of the dispute. Notice to servants of such persons is not equivalent to notice to them, and in such cases actual notice should be given to all the persons claiming or denying the right and interested in the subject-matter of the enquiry. Magistrates should not institute proceedings under section 147, unless they are satisfied that a real danger of the evil, for the prevention of which the procedure was devised, does in fact exist. Such enquiries may lead to injustice being done from defective procedure, and a Magistrate would be wise not to use the section in cases where it must involve a long and complicated enquiry and the presence of a large number of people when the remedy of binding down a few persons to keep the peace is ready to his hand. [illegible]

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appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done, as the case may be, until the person objecting to such thing being done, or claiming that such thing may be done, obtains the decision of a competent Civil Court, adjudging him to be entitled to prevent the doing of, or to do, such thing as the case may be : Ch. XII s. 147

Provided, that no order shall be passed under this section, permitting the doing of anything where the right to do such thing is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry; or, where the right is exercisable only at particular seasons, unless the right has been exercised during the season next before such institution.

This section, though more general in its terms, practically embodies the provisions of s. 532 of Act X of 1872.

Tangible Immoveable Property.—See note to s. 145.

The Civil Court is the proper tribunal to settle disputes relating to land, and though the Magistrate has a discretion as to whether he will inquire into a dispute, he should only do so to prevent a breach of the peace.—*In re Russool Nushyo*, 11 W. R., Cr., 3. This section is not intended to provide a substitute for a civil suit to declare the rights of the parties.—*In re Moonshee Hurukh Lall*, 6 W. R., Cr., 74; but see *In re Bhoiro Mundul*, 14 W. R., Cr., 28.

To enable a Magistrate to interfere in any matter under the section, there must be some substantial dispute in some way necessitating the interference of the criminal authorities.—*Maharajah of Burdwan* v. *The Chairman of Darjeeling Municipality*, I. L. R., 5 Calc., 194; (S. C.) 4 C. L. R., 324. The section only enables the Magistrate to prevent arbitrary interruption by any person of rights actually enjoyed by the public, a person or class of persons; it does not enable him to make a purely declaratory order.—*Ibid.* In an early case, decided upon the corresponding section of the Code of 1861, it was decided, that there was nothing in the section which made it imperative that there should be an apprehended breach of the peace before the authorities could interfere to decide a right of way.—*Queen* v. *Toyluckonath Sircar*, 2 W. R., Cr., 64.

The burden of proof is upon the person alleging the right to restrain another from exercising ordinary proprietary rights over his own land, such a right being of the nature of an easement different from the ordinary rights of owners of land. —*In re Hari Mohun Thakoor* v. *Kissen Sundari*, I. L. R., 11 Calc., 52.

"The object of this section (s. 532 of Act X of 1872)," said PHEAR, J., "is not to prevent the mischief or injury which may accrue by reason of the disturbance or assertion of the right to the persons who are disputing about it, but to stop the public manifestation of the dispute itself. The jurisdiction which is given to the Magistrate is intended for the purpose of preserving the public peace. It does not convert the Magistrate into a Court which is to determine rights between parties or to consider and discuss any questions of proprietary damage done to individuals."—*Rosik Lall Nundi* v. *Kartik Shaut*, 22 W. R., Cr., 48.

When it appears that the use of water is open to the public or to any person or class of persons, the Magistrate may, under this section, order that possession shall not be taken by any party to the exclusion of the public, or such persons, until the party claiming possession obtains a decree adjudging such exclusive possession to him.—*Moonshee Hurukh Lall, Petitioner*, 6 W. R., Cr., 74.

An obstruction of a drain into which the sewage of complainant's premises fell did not, it was held, come within the terms of the section. In such a case, a civil suit and injunction would be the proper remedy.—*In re Troylukhonath Bose*, 1 Wym. Cr. Rul., 52.

Ch. XII s. 148 In the case of *Lindsay*, Petitioner, I. L. R., 4 Mad., 121, a complaint was made to a Magistrate that an obstruction had been raised and existed on land reserved by Government and dedicated as a public road. An *ex parte* order purporting to be made under s. 532 of Act X of 1872 (this section) directing the party in possession not to retain possession until he should obtain the decision of a competent Civil Court adjudging him entitled to exclusive possession, with a further direction to remove the obstruction, was made, but the High Court held it to be bad in law. The section, it was said, authorizes the Magistrate to exercise the jurisdiction it confers only when the subject of dispute is open to the use of the public. The Legislature, in conferring on the magistracy power to intervene for the temporary settlement of disputed civil rights, is careful to direct the preservation of the *status quo* existing at the time proceedings are instituted. . . . . So much of the order as directed the removal of the obstruction was therefore *ultra vires*.—*Ibid*, *per Curiam*.

In an investigation as to the right of use of land, a Deputy Magistrate has no legal competency to order the destruction of a wall existing before the case came on, notwithstanding that a right of pathway may appear to have been infringed by the accused party.—*In re Sreemonto Doloolee* v. *Ram Chand Aduck*, 1 Wym. Cr., Rul., 50; (S.C.) 5 W. R., Cr., 57.

Where a dispute had arisen between the Mahomedan and Hindu inhabitants of a town as to the right of the latter to carry corpses along a certain public street to the burning ground, the Magistrate passed an order, purporting to be made under s. 532 of the Code of 1872, directing that the Hindus should carry corpses by the nearest route to the burning ground and not by the street, to the use of which for such purposes the Mahomedans objected. It was held the order was illegal.—*In re Narayana Taragan*, I. L. R., 7 Mad., 49.

Procedure.—As to procedure see note to s. 145, *supra*.

The jurisdiction given by this section to decide for a time the right to enjoyment of property should not be exercised except on clear and satisfactory proof. Where the only evidence is user, it should be such as to show satisfactorily acts of enjoyment exercised as a matter of right, and permitted uninterruptedly for some considerable length of time.—*Mad. H. C. Pro.*, *14th Jany.* 1869, *Weir*, p. 27.

A right of way or a right to the flow of water across the land of another is a right of use of land within the meaning of the section.—*Mad. H. C. Pro.*, *18th and 21st Feby.* 1867, and *1st June* 1868, *Weir*, p. 27.

In some cases which might come under this section proceedings may be taken under s. 133, *ante*. Where such proceedings are taken, the Magistrate may issue an order *ex parte*, or on mere report, it being competent to the person to whom the order is directed to appear and show cause against it, and demand the submission of the question of right to the decision of a jury. Under this section, however, the inquiry precedes the issue of the order, and the inquiry presumes not that one party only, but that both parties to the dispute, will be afforded the opportunity of appearing and adducing evidence on all material matters. If no such inquiry is held, an order under this section cannot be supported.—*In re Lindsay*, I. L. R., 4 Mad., 121.

For form of Magistrate's order, prohibiting the doing of anything on land or water, see Sched. V, No. 24.

As to costs, see next section.

148. Whenever a local inquiry is necessary for the purposes of this chapter, any District Magistrate or Subdivisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instruction consistent with the law for the time being in force as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

Local inquiry.

— when a magistrate passed an order under S. 148. Cr. P. Code, but did not state what the amount was to be, held that his successor in office had no jurisdiction to pass an order assessing such costs.
Bhojal Sonar and others vs. Khaan Singh & others
I. L. R. 21 Cal 609

The report of the person so deputed may be read as evidence in the case. Ch. XIII s. 149

When any costs have been incurred by any party to a proceeding under this chapter for witnesses' or pleaders' fees, or both, the Magistrate passing a decision under section 145, section 146, or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. All costs so directed to be paid may be recovered as if they were fines.

Order as to costs.

The first part of this section corresponds with s. 533 of Act X of 1872. The second and third paragraphs are new.

As to levy of fines, see ss. 383-388, *infra*.

"The local inquiry referred to in the section should be restricted solely to some question relating to the features of the property about which the dispute has arisen; and should not be directed to any matter which can be proved before the Magistrate by oral evidence."—*Per* PRINSEP, J., *In re Baikunt Kumar*, 3 C. L. R., 134.

When a local inquiry under this section is instituted, it becomes part of the proceedings in the case, and the party affected by it is entitled to be acquainted with the results of it, and to have an opportunity of rebutting the deputed Magistrate's report if he thinks necessary.—*Mir Dhunoo* v. *Brown*, 21 W. R., Cr., 25.

The local inquiry should be a personal inquiry before the person deputed—*Mad. H. C. Pro.*, 13*th November* 1868, *Weir*, p. 26. And the duty of making it, if deputed, should be deputed to a Magistrate, and not to a *canungoe*.—*In re Uma Churn Santra*, 7 C. L. R., 352.

Proceedings under this section, it was held by PRINSEP and GRANT, JJ., should, on all points of procedure, be regarded as summons cases, and although it is discretionary with a Magistrate to issue a summons on a witness in such a case, yet, when any one of the parties applies at a proper time for process to secure the attendance of his witnesses, the Magistrate should not arbitrarily refuse his assistance, and when such refusal is made, it is incumbent on the Magistrate to record his reasons for such refusal.—*In re Hurendro Narain Singh Chowdhry*, I. L. R., 11 Calc., 762. Section 355 deals with the manner of taking evidence in summons cases, while s. 356 provides a different method in case of proceedings under this chapter.

CHAPTER XIII.

PREVENTIVE ACTION OF THE POLICE.

149. Every Police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent the commission of any cognizable offence.

Police to prevent cognizable offences.

This is s. 95 of Act X of 1872, with mere verbal alterations.

As to what is a 'cognizable offence,' see s. 4 (*q*), *ante*, p. 7.

By s. 151, *infra*, a Police-officer may arrest without warrant if it appears to him that the commission of an offence cannot otherwise be prevented. Should he do so, his subsequent procedure must be regulated by s. 60 (*supra*, p. 46), which directs that he shall, without unnecessary delay, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a Police-station. An officer in charge of a Police-station can proceed to

Ch. XIII secs. 150-152

inquire into such offences when they have been committed within the limits of such station. He should, however, when a complaint is made to him, reduce such into writing, and enter the substance thereof in the diary, whether the occurrence, which is the subject of the complaint or information, took place within his jurisdiction or not.—*Bengal Police Manual, 2nd Edition,* 374.

For further duties of Police-officers, see ss. 23, 25, 30 and 31 of Act V of 1861 in Bengal.

Information of design to commit such offences.

150. Every Police-officer receiving information of a design to commit any cognizable offence shall communicate such information to the Police-officer to whom he is subordinate and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

This corresponds with s. 96 of Act X of 1872, the words 'whose duty it is,' after the words 'other officer,' being substituted for the words 'whom it may concern.'

The duties under this section should be performed without reference to local jurisdiction.

Arrest to prevent such offences.

151. A Police-officer, knowing of a design to commit any cognizable offence, may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

This corresponds with s. 97 of Act X of 1877, the words 'it appears to such officer that' being inserted.

The Police-officer must report all cases of arrests without warrant to the District Magistrate, or, if he so directs, to the Subdivisional Magistrate.—s. 62, *supra*, p. 47.

No person arrested by a Police-officer should be discharged except on his own bond or on bail, or under the special order of the Magistrate.—s. 63, *supra*, p. 48.

Where an arrest is made under this section without warrant, it is the duty of the Police-officer, without unnecessary delay, and, subject to the provisions as to bail, to take or send the person arrested before a Magistrate having jurisdiction, or before the officer in charge of a Police-station.—s. 60, *supra*, p. 46.

Prevention of injury to public property.

152. A Police-officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immoveable, or the removal or injury of any public landmark, or buoy or other mark used for navigation.

This corresponds with s. 98, para. 1, of Act X of 1872.

The offences referred to are dealt with by ss. 430—434 of the Indian Penal Code. The only one for which a Police-officer cannot arrest without warrant is that of injuring a public landmark (s. 434 of the Indian Penal Code). Accordingly a Police-officer cannot, in case of such an offence, proceed under s. 151, as it is now cognizable.

If the injury be committed, and amount to an offence for which a Police-officer is not authorized to arrest without warrant, he should take the name and address of

the offender, with a view to instituting a prosecution against him. (See s. 24, Act V of 1861.) Under any circumstances, if the injury, whether it amount to an offence or not, is committed in direct opposition to a Police-officer actively engaged in endeavouring to prevent its commission, the offender may be arrested, under s. 54, cl. v, *supra*, for obstructing a Police-officer while in the execution of his duty. See *Bengal Police Manual*, 2nd Edition, p. 375.

Where an arrest is made under this section without warrant, it is the duty of the Police-officer, without unnecessary delay, and subject to the provisions of this Code as to bail, to take or send the person arrested before a Magistrate having jurisdiction or before the officer in charge of a Police-station.—*S.* 60, *supra*, p. 46.

Under s. 61, a person arrested without warrant by a Police-officer is not to be detained for a longer period than, under all the circumstances of the case, is reasonable; and, in the absence of a special order of a Magistrate under s. 167, *post*, this period is not to exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Inspection of weights and measures.

153. Any officer in charge of a Police-station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures, or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.

If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

This corresponds with s. 381 of Act X of 1872, substituting the words 'any place' for the words 'any shop or premises.'

The Calcutta Police have similar powers under Act IV of 1866: the Bombay Police, under Act XLVIII (Bom.), 1860; Act IV (Bom.), 1882: and the Madras Police, under Act VIII (Mad.) of 1867.

PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.*

CHAPTER XIV.

Information in cognizable cases.

154. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a Police-station, shall be reduced to writing by him or under his direction, and be

* In the absence of any specific provision to the contrary, nothing in this Code shall apply to the Commissioners of Police in the Towns of Calcutta, Madras, and Bombay, or the Police in the Towns of Calcutta and Bombay.—*S.* 1 (*a*), *supra*.

Ch. XIV s. 155 read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

See s. 112 of Act X of 1872, which provided that a complaint to a Police-officer should be signed, sealed or marked.

Doubtless, under this section, where the information is given by a person unable to write, his mark will be taken as a sufficient signature.

Section 180 of the Penal Code provides: "Whoever refuses to sign any statement made by him when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to Rs. 500, or with both."

'Information' is not defined by this Act. It does not come within the definition of complaint in s. 4 (*a*), *supra*, p. 4.

Where a complaint made to the police is found to be false, the complainant may be prosecuted under s. 211 of the Penal Code.—*Empress* v. *Salik Roy*, 8 C. L. R., 255. See *In re Sakina Bibee*, 8 C. L. R., 387; *Government* v. *Karimdad*, I. L. R., 6 Calc., 496; (S. C.) 7 C. L. R., 467; *Syed Nissar Hossein* v. *Ram Golam Singh*, 25 W. R., Cr., 10; *In re Chukradar Potti*, 8 C. L. R., 289. See notes to s. 195, *infra*.

Giving false information to a Police-officer with intent to cause a public servant to use his lawful power to the injury or annoyance of any person is an offence punishable under s. 182 of the Penal Code. If the Police-officer makes an investigation, he is entitled to examine the person giving the information; and the latter is now bound to answer truly (s. 161, *infra*); and, if he knowingly answers falsely, he commits an offence under s. 193 of the Indian Penal Code.—*Empress* v. *Parshram Ray Sing*, I. L. R., 8 Bom., 216.

The complaint or information reduced into writing under this section forms part of the First Information Report.

The book in which the substance of the informations must be entered under this section appears to be the Police-diary kept under s. 44 of the Police Act, V of 1861, and any Criminal Court may send for the Police-diaries of a case under inquiry or trial in such Court, and may use such diaries to aid in such inquiry or trial.—*Section* 172, *infra*. But a prisoner has no right to insist that a Police-diary, if not in Court, shall be sent for, or, if it be in Court, that it be referred to for the purpose of refreshing the memory of a Police-officer under examination.—*In re Kali Churn Chunari*, 10 C. L. R., 51; (S. C.) I. L. R., 8 Calc., 154; see *Reg.* v. *Uttamchand Kapur Chand*, 11 Bom. H. C. R., 120. Any Criminal Court, however, may send for the Police-diaries of a case under inquiry or trial, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.—*Section* 172, *infra*. This diary is purely for police purposes, for the information of the superior officers of police, and the future guidance of the officer in charge of the Police-station, and ordinarily it ought not to be sent to the Magistrate trying the case; but if, on the trial, the Magistrate requires the production of the diary, it must be produced. The Government cannot impose any limit upon the discretion of Magistrates in calling for evidence, or in judging what is or is not evidence according to law. Although the diary kept by a Police-officer is not evidence *of the fact stated therein*, except against that officer, it may be evidence of other facts. See *Bengal Police Manual*, 2nd Edn., p. 376.

Information in non-cognizable cases.

155. When information is given to an officer in charge of a Police-station of the commission, within the limits of such station, of a non-cognizable offence, he shall enter in a book to be kept as

An offence under § 9 of the Opium Act (I of 1878) is a non cognizable offence, and is therefore one for which by section 4 of the Criminal P. Code a police officer cannot arrest without warrant; and he has therefore under s. 155 of the Code no authority to investigate such an offence without the order of a magistrate; nor under s. 165 can he make search in respect to it.

Ahmad Shah v. [illegible] nath Chowdhury

[illegible] 24 Cal 691

aforesaid, the substance of such information, and refer the informant to the Magistrate. Ch. XIV s. 156

Investigation into non-cognizable cases.

No Police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

Any Police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a Police-station may exercise in a cognizable case.

The first part of this section corresponds with s. 113 of Act X of 1872. The second and third clauses correspond generally with s. 110 of that Act. Under the former section, the station-diary was specified as the book in which the entry referred to was to be made.

The case of *Foktu Shah*, 2 B. L. R., S. N., vii, in which GLOVER, J., dissented from the case of *Harrackchand Nowlaka*, 8 W. R., Cr., 12, is superseded by this section.

A non-cognizable offence is defined in s. 4 (*q*), *supra*, p. 7.

As to the use which the Court may make of Police-diaries, see s. 172, *infra*, and the note to the preceding section.

An information respecting any offence is not chargeable with a fee.—*Act VII of* 1870, *s.* 19, *cl. xvi.*

No Police-officer may, without *the express order of a Magistrate*, investigate an offence not cognizable by the police.—*Smyth*, p. 83. The Magistrate under this section must, in addition to being a Magistrate of the first or second class, have power to try the case or commit it for trial.

'Investigation' includes all the proceedings under the Code for the collection of evidence conducted by the police or by any person other than a Magistrate or Police-officer who is authorized by a Magistrate in that behalf.—*Section* 4 (*b*), *supra*, p. 4.

The powers of an officer in charge of a Police-station are specified in the next section.

A third class Magistrate is not referred to by the section, and such a Magistrate, it has been held, has no power to direct the police to hold an investigation as to the truth of a complaint.—*Mad. H. C. Pro.*, 22*nd May* 1874; *Weir*, p. 7. But if a Magistrate, not empowered by law in that behalf, erroneously but in good faith orders the police under this section to investigate, his proceedings shall not be set aside on the ground of his not being empowered.—*S* 529 (*b*), *post.*

In the case of *Kristo Lall Nag*, I. L. R., 10 Calc., 256, it was held, that statements of witnesses, or confessions taken at a police investigation, are not, *as far as their subject-matter is concerned*, any more the property of the police than the property of the prisoners, and that a pleader was not guilty of misconduct in making use of copies of such documents for the benefit of his client when delivered to him by the client, however improperly the client may have become possessed of them, provided the pleader was neither party nor privy to the obtaining of them. In that case the accused, a pleader, was charged with having used copies of documents improperly obtained from the clerks in the Police Office.

Investigation into cognizable cases.

156. Any officer in charge of a Police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of

Ch. XIV s. 157

such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

No proceeding of a Police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

The first part of this section corresponds with ss. 109 and 114, para. 2; and the second part, with the last paragraph of s. 114 of Act X of 1872.

The effect of applying the provisions of Chap. XV relating to the place of inquiry or trial to police investigations in cognizable cases, is to give the officer in charge of a Police-station power to investigate cases over which more than one Court has jurisdiction. Thus, murder by a thug may be investigated wherever the accused may be found.—*Section* 181, *infra.*

By s. 183, *infra*, an offence committed in the course of a journey or voyage may be enquired into and tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

The report which, under s. 114 of Act X of 1872, was required to be sent to "the Magistrate having jurisdiction," must now, under the next section, be sent to "a Magistrate empowered to take cognizance of such offence upon a police report." The Magistrate so empowered would be a Presidency Magistrate, District Magistrate, Subdivisional Magistrate or any other Magistrate specially empowered to take cognizance of any offence upon a police report.—*Section* 191, *infra.*

Section 161, *post*, makes it obligatory on a person examined in the course of a police investigation under this chapter to answer truly all questions put to him (other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture), and such person, if he knowingly answers falsely, commits the offence of knowingly giving false evidence, in a stage of a judicial proceeding, under s. 193 of the Penal Code.—*Empress* v. *Parshram Ray Sing*, I. L. R., 8 Bom., 216.

Procedure where cognizable offence suspected.

157. If, from information received or otherwise, an officer in charge of a Police-station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report, and shall proceed in person, or shall depute one of his subordinate officers to proceed, to the spot to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender:

Provided as follows:—

Where local investigation dispensed with.

(*a*) when any information as to the commission of any such offence is given against any person by name, and the case is not of a serious nature, the officer in charge of a Police-station need not

proceed in person or depute a subordinate officer to make an investigation on the spot: Ch. XIV s. 158

Where Police-officer in charge sees no sufficient ground for investigation.

(b) if it appear to the officer in charge of a Police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

In each of the cases mentioned in clauses (a) and (b), the officer in charge of the Police-station shall state in his said report his reasons for not fully complying with the requirements of the first paragraph of this section.

The first clause of this section corresponds with para. 1 of s. 114 of Act X of 1872.

Proviso (a) corresponds with s. 116, and proviso (b) with para. 1 of s. 117, of the same Act, omitting the words in the latter 'or that immediate arrest is not necessary,' there being no reason why a Police-officer should be debarred from investigating a case of a cognizable offence, because he does not at starting feel himself justified in arresting any person.

The last paragraph of the section is new.

A complaint or information preferred to an officer in charge of a Police-station, of the commission within his local jurisdiction of an offence cognizable by the police, if there is reason to suspect that it has been committed, should be immediately reported to the Magistrate empowered to take cognizance of the offence. The object is clear. The Magistrate is primarily responsible for the condition of the district or division of the district in which he has local jurisdiction, and he cannot divest himself of that responsibility. He should not rest content with reading the report, but he should watch the various steps taken by the police, and advise them in all cases when necessary; and the police should keep the Magistrate informed of their action. See *Smyth*, p. 83.

If, on any complaint or information being preferred, a Police-officer sees no sufficient ground for investigation, he shall report the substance of the complaint for the orders of the Magistrate having jurisdiction.—*Smyth*, p. 83.

By C. O. No. 7 of the Calcutta High Court, dated 20th July 1871, Magistrates were cautioned against the indiscriminate use of police agency for the purpose of ascertaining matters as to which a Magistrate is bound to give his own opinion upon evidence given in his presence.

Where a Police-officer in charge of a Police-station finds there is no sufficient ground for entering on an investigation, and is therefore precluded by this section from entering upon an inquiry, no other Police-officer is competent to make such inquiry unless he is authorized, or required to do so, by an order of the Magistrate.—*Calc. H. C. C. O.*, *20th July* 1871; 7 B. L R., *Rules*, 15.

In Burma, reports of the nature referred to in this section must be submitted to the Magistrate having jurisdiction through the District Superintendent of Police; or, if no such officer be resident at the station, through the Assistant Superintendent of Police; or, if there be no Assistant Superintendent in the station, through the Inspector. If no District Superintendent, Assistant Superintendent, or Inspector is resident at the station, the report must be submitted to the Magistrate having jurisdiction.—*Burma Gazette*, 1879, Part II, p. 189. See next section.

Reports under section 157 how submitted.

158. Every report sent to a Magistrate under section 157 shall, if the Local Government so directs, be submitted through such superior officer of police as the Local Government, by general or special order, appoints in that behalf.

Ch. XIV s. 160

Such superior officer may give such instructions to the officer in charge of the Police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

This section corresponds with para. 2 of s. 117 of Act X of 1872.

'Such superior officer,' that is, an officer superior to an officer in charge of a Police-station.

In Burma, the District Superintendent or other chief officer of Police in the district is the superior officer of police through whom the report of the substance of a complaint or of any information is to be submitted for the order of the Magistrate having jurisdiction.—*Burma Gazette*, 1873, Part II, p. 7.

Power to hold investigation or preliminary inquiry.

159. Such Magistrate, on receiving such report, may, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold an investigation or preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code.

This section corresponds with s. 115 of Act X of 1872, with an alteration empowering the Magistrate deputed by a superior Magistrate in the alternative to hold *an investigation* or preliminary inquiry.

As to what is an investigation, see s. 4 (*b*), *supra*, p. 4.

If a Magistrate takes an active part in the arrest of persons charged with having committed an offence, he is bound to state to the accused, so far as he can, what were the facts which he himself observed, and to which he himself can bear testimony; and the prisoner has a right to cross-examine the Judge, whose evidence should be recorded, and should form part of the record in the case. The proper course, however, for the Magistrate to take is to decline to try the case, and to ask that it should be undertaken by some other Magistrate.—*Hurro Chunder Paul, Petitioner*, 20 W. R., Cr., 76; see the remarks of PHEAR, J.
As to registers of preliminary inquiries in Madras, see *Weir*, p. 27.

Police-officer's power to require attendance of witnesses.

160. Any Police-officer making an investigation under this chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station, who, from the information given or otherwise, appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

This section, which applies to any Police-officer making an investigation, embodies the first part of s. 118 of Act X of 1872, which, however, applied to an officer in charge of a Police-station, or other officer making an investigation.

In Madras, a Full Bench expressed an opinion that this section does not authorize a Police-officer to require the attendance of an accused person with a view to his answering the charge. The intention of the Legislature seemed to have been only to provide a facility for obtaining evidence, and not for procuring the attendance of the accused.—*Empress* v. *Sammada Chetti*, I. L. R., 7 Mad., 274.

With regard to persons whose evidence is required by a Police-officer making an inquiry, no power exists to arrest or detain them for a single moment. An officer in charge of a Police-station may, under this section, by an order in writing, require the attendance of persons whose evidence is necessary, and persons summoned are bound to obey the order; but in no case can the Police-officer compel a

This section [illegible] with §162

§161. The test as to whether [illegible] comes within paragraph 2 [illegible] was a question put to the person by a police officer and was what was [illegible] person stated in answer to that question

It is not illegal though [illegible] for a police officer recording a statement under §161 Cr. P.C. to obtain the signatures of persons present at the time to authenticate his record of such statement.

Queen Empress v. Bhagwanta I.L.R. 15 All 11.
see also I.L.R. 15 All 25.

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§161. The privilege given by section 172 of the Code of Criminal Procedure does not extend to statements taken under section 161, but recorded in the diary made under section 172.
Sheru Sha and others v. The Queen Empress on the Prosecution of Rashu Gossain
I.L.R. 20 Cal 642

witness by force to attend before him.—*Queen* v. *Behary Sing*, 7 W. R., Cr., 3. Disobedience to an order to attend is punishable, however, under s. 174 of the Indian Penal Code. Ch. XIV s. 161

The order requiring the attendance of a witness may be in a prescribed form and lithographed.—*Smyth*, p. 85; see s. 4 (*e*), *supra*. It is not a summons.

By s. 5 of Act V of 1861, the Inspector-General of Police has the full powers of a Magistrate throughout the general police district, but must exercise those powers subject to such limitation as may, from time to time, be imposed by the Local Government. By s. 6, the Local Government may vest any Deputy Inspector-General, Assistant Inspector-General, District Superintendent, or Assistant District Superintendent of Police with all powers or any of the powers of a Magistrate within such limits as it may deem proper; but such officers respectively shall exercise the powers with which they shall be so vested, only so far as it may be necessary for the preservation of the peace, the prevention of crime, and the detection, apprehension, and detention of offenders in order to their being brought before a Magistrate, and so far as may be necessary for the performance of the duties assigned to them by that Act.

As to summoning witnesses from another district under s. 6 of Act V of 1861, the following rule is in force in the Panjab:—In every case in which a District Superintendent may exercise the power, he must be able to affirm its necessity in terms of the section above quoted. This will not ordinarily be the case where there are persons in custody on a *primâ facie* charge, as they must be sent before the Magistrate within a reasonable period, which must not, in the absence of the special order of a Magistrate, exceed twenty-four hours. If the inquiry cannot be completed within that period, it would be more convenient for the Magistrate to summon the witnesses than the District Superintendent, and this would also be more in conformity with the spirit of the law.—*Smyth*, p. 86.

The following information is published for the guidance of Police-officers: Causing attendance under this section does not amount to an arrest; and in no case can a Police-officer compel a witness by force to attend before him. A Police-officer may summon parties to a Police-station for the purpose of obtaining information from them; but if the voluntary action of such parties is in any way interfered with, such interference would constitute an arrest. Instances have occurred when suspected parties have been summoned to a Police-station for inquiry and have been detained all night. Unless they remained voluntarily, such detention constitutes "an arrest." Under the orders of Government, No. 6355, dated 13th November 1865, Police-officers, when causing the attendance before them of Railway employés, must send immediate information to the head of the department under which such employés are serving. See *Bengal Police Manual*, 2nd Edn., p. 378.

161. Any Police-officer making an investigation under this chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Examination of witnesses by police.

Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

This section embodies the latter part of s. 118, paras. 1 and 2 of s. 119 of Act X of 1872, inserting the word 'truly' in the last paragraph.

It was ruled by a Full Bench of the High Court at Calcutta, that ss. 118 and 119 of Act X of 1872 imposed no obligation upon a person examined by the police under those sections to speak the truth.—*Empress* v. *Kassim Khan*; *Empress* v. *Mussamut Dubee*, I. L. R., 7 Calc., 121; (S. C.) 8 C. L. R., 300. The Full Bench

Ch. XIV s. 162 overruled the case of *Queen* v. *Nimchand Mookerjee*, 20 W. R., 41, and their decision is also directly opposed to a previous decision in the case of *Juggernath Sahai*, 8 C. L. R., 236. Sections 118 and 119, it was said, were merely intended to oblige persons to give such information as they can to the police in answer to the questions which might be put to them.—*Empress* v. *Kassim Khan*, I. L. R., 7 Calc., 121; (S. C.) 8 C. L. R., 300. It will be observed that the decision of the Full Bench has been superseded by this section, which provides that a person examined under it shall be bound to answer truly all questions put to him. If he knowingly answers falsely, he commits the offence of giving false evidence, in a stage of a judicial proceeding, under s. 193 of the Indian Penal Code.—*Empress* v. *Parshram Ray Sing*, I. L. R., 8 Bom., 216; *Nathu Sheikh* v. *Empress*, I. L. R., 10 Calc., 405.

It is not obligatory upon a Police-officer to reduce into writing any statements made to him during an investigation. Where statements so made are reduced by him into writing, oral evidence of such statements is still admissible under s. 91 of the Evidence Act.—*Reg.* v. *Uttamchand Kapurchand*, 11 Bom. H. C. R., 120. The police are not to reduce to writing, or make witnesses sign statements, with a view to send in the papers as part of the record to be used as evidence.—*Smyth*, p. 85. They are not to record except for their own private information, and therefore not to form part of the record any statement or admission of guilt which may be made before them. If the police persist in doing this, their charge sheets should be returned to them, and, if necessary, a report made to their superior authority.—*Smyth*, p. 85.

In the case of *Kristo Lall Nag*, I. L. R., 10 Calc., 256, it was held, that statements of witnesses or confessions, taken at a police investigation, are not, *as far as their subject-matter is concerned*, any more the property of the police than the property of the prisoners, and that a pleader was not guilty of misconduct in making use of copies of such documents for the benefit of his client when delivered to him by the client, however improperly the client may have become possessed of them, provided the pleader was neither party nor privy to the obtaining of them. In that case the accused, a pleader, was charged with having used copies of documents improperly obtained from the clerks in the police office.

In giving evidence, a Police-officer may refresh his memory by referring to documents in which he has reduced into writing, under this section, statements of persons examined by him during an investigation; but the documents themselves cannot be used as evidence (see s. 162), and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses.—*Roghuni Singh* v. *Empress*, I. L. R., 9 Calc., 455; (S. C.) 11 C. L. R., 569. See *In re Sheikh Dabu*, 6 C. L. R., 47, and note to s. 154, *supra*.

Statements to police not to be signed or admitted in evidence.

162. No statement, other than a dying declaration, made by any person to a Police-officer in the course of an investigation under this chapter shall, if reduced to writing, be signed by the person making it, or *shall* [Act X of 1886, s. 6] be used as evidence against the accused.

Nothing in this section shall be deemed to affect the provisions of section 27 of the Indian Evidence Act, 1872.

See s. 119, para. 3, and s. 121 of Act X of 1872.

Oral evidence of the statements made and reduced into writing is not inadmissible under s. 91 of the Evidence Act.—*Reg.* v. *Uttamchand Kapurchand*, 11 Bom. H. C. R., 120. The writing itself cannot be treated as part of the record, or used as evidence, but may be used for the purpose of refreshing memory under s. 159 of the Evidence Act. Consequently, the person making the statements may be cross-examined about them, and with a view to impeach his credit, the Police-officer

§161, 162. Statements made to Police officer in the course of an investigation. Use of notes of such statements at trial. — A police officer's notes of statements made to him in the course of an investigation are not excluded by the said §161 Cr. P. Code [illegible] at the subsequent trial [illegible] proof of them and the circumstances under which they were recorded [illegible] the sanction of the presiding Judge [illegible] such notes should not be given without question [illegible] as a matter of course to the [illegible] counsel.

Queen Empress v. [illegible] and others
I.L.R. 16 All. [illegible]

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§§161, 162. Use at trial in Sessions Court of statements made to Police officer investigating case. Evidence.

Queen Empress v. Taj Khan & others
I.L.R. 17 All. 56

[illegible] made by a witness under s. 161 Cr. P.C to a Police officer investigating a case may be proved at the trial of such case to contradict a witness, the witness having been first cross examined upon the point in respect of which it is sought to contradict him but it can not be used as evidence against the accused

Queen Empress v Sitaram Vithal I.L.R 11 Bom 657 approved

Queen Empress v. Mauko I.L.R 15 All 25

himself, or any other person in whose hearing the statements were made, can be examined on the point under s. 155 of the same Act.—*Ibid; Roghuni Singh* v. *Empress*, I. L. R., 9 Calc., 455; (S. C.) 11 C. L. R., 569.

So, in *Reg.* v. *Uttamchand Kapurchand*, 11 Bom. H. C. R., 120, it was decided that, when a witness comes forward at a trial, and makes a statement contradicting his statement previously made to the police, the accused, or his pleader, is entitled to cross-examine him with respect to his former statement, and that the witness may be contradicted by calling the Police-officer before whom he made the statement, and the Police-officer may refresh his memory from his diary. The Court, in the case of *Kalichurn Chunari*, 10 C. L. R., 51; (S. C.) I. L. R., 8 Calc., 156, concurred in that decision, but held that the accused has no right to insist that a Police-diary, if not in Court, shall be sent for, or, if it be in Court, that it be referred to for the purpose of refreshing the memory of a Police-officer under examination.

By s. 155 of the Evidence Act, the credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; and by s. 157, "in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

A Police-officer, by whom a statement has been reduced to writing, may, while under examination, refresh his memory by referring to the writing made by him.—*Evidence Act, I of* 1872, *s.* 159. See *In re Sheikh Dabu*, 6 C. L. R., 47.

Section 121 of Act X of 1872 provided that no Police-officer should record any statement, or any admission or confession of guilt, which might be made before him by a person accused of any offence: Provided that nothing should preclude a Police-officer from reducing such statement, or admission, or confession into writing for his own information or guidance, or from giving evidence of any dying declaration.

Any such statement, or admission, or confession reduced into writing ought not to form part of the record to be sent to the Magistrate.—*Smyth*, p. 85.

By s. 25 of the Evidence Act, I of 1872, "no confession made to a Police-officer shall be proved as against a person accused of any offence;" and by s. 26, "no confession made by any person whilst he is in the custody of a Police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person:" "Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."—*Section* 27.

B and R, accused of offences under s. 414 of the Penal Code, gave information to the police, which led to the discovery of the stolen property. This information was to the effect, that they (the accused) had stolen a cow and calf, and sold them to a particular person at a particular place. A Full Bench (Mahmood, J., dissenting) held, that s. 27 of the Evidence Act was a proviso not only to s. 26, but also to s. 25, and that, therefore, so much of the information given by the accused to the Police-officer, whether amounting to a confession or not, as related distinctly to the facts thereby discovered, might be proved.—*Empress* v. *Babu Lal*, I. L. R., 6 All., 509.

No judicial officer, however, dealing with the provisions of s. 27 of the Evidence Act, should allow one word more to be deposed to by a Police-officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. Section 27 is not intended to let in a confession generally.—*Per* Straight, J., *Empress* v. *Babu Lal*, I. L. R., 6 All., 509, followed by Norris, J., in *Adu Shikdar*, I. L. R., 11 Calc., 635, p. 641; see *Empress* v. *Pancham*, I. L. R., 4 All., 198.

Statements made to Police-officers as to the ownership of property, which is the subject-matter of proceedings against them, although inadmissible under the

Ch. XIV s. 162 Evidence Act as evidence against them at the trial for the offence with which they are charged, are admissible as evidence with regard to the ownership of the property in an inquiry held by the Magistrate under s. 523, *post.*—*Empress* v. *Tirbhovan Manekchand*, I. L. R., 9 Bom., 131.

In the case of *Empress* v. *Dabee Pershad*, I. L. R., 6 Calc., 530; (S. C.) 7 C. L. R., 541, at the Criminal Sessions of the Calcutta High Court, Prinsep, J., relying on the opinion expressed by Phear, J., in *Reg.* v. *MacDonald*, 10 B. L. R., Appx., 2, held, that an admission, not being a confession, of guilt made by an accused person to a Police-officer, was admissible in evidence. Such an admission, however, would not be admissible if made in the course of an investigation under this chapter. See *In the matter of Hiran Miya*, 1 C. L. R., 21; *Reg.* v. *Hurribole Chunder Ghose*, I. L. R., 1 Calc., 207; *Empress* v. *Rama Birapa*, I. L. R., 3 Bom., 12; *Reg.* v. *Jora Hasji*, 11 Bom. H. C. R., 242.

In the case of *Empress* v. *Pandharinath*, I. L. R., 6 Bom., 34, it was held, that a statement made to a Police-officer, while in the custody of the police, although intended to be made in self-exculpation, might be nevertheless an admission of a criminating circumstance, and, if so, it could not, under ss. 25 and 26 of the Evidence Act, be proved against the accused. In that case, the accused was charged, under ss. 467 and 471 of the Indian Penal Code, with having dishonestly used as genuine a forged cheque. Melvill, J., in delivering the judgment of the Court, said: "The witness No. 14, a Police-officer, says: 'The accused was sent for and shown this cheque, and he said that one Kisan had given it to him. This was at the *ferashkhana*. He was in custody. Accused said this after arrest.' The statement of the prisoner that Kisan had given him the cheque was used by the prosecution as an admission by the prisoner that he had had possession of the cheque, and it was put to the jury as amounting to such an admission. It is contended that ss. 25 and 26 of the Indian Evidence Act (I of 1872) prohibit such a use of such a statement when made to a Police-officer or by a person in custody of a Police-officer, and we have come to the conclusion that this contention is well founded."—See remarks of West, J., in the case of *Empress* v. *Daji Narsu*, I. L. R., 6 Bom., 288, p. 291.

It must be borne in mind that the provisions of this chapter do not apply to the Police in Calcutta or Bombay.—*S.* 1 (*a*), *supra*.

Dying Declaration.—The dying statement of a deceased person must be taken in the presence of the accused. If it is not so taken, the writing cannot be admitted to prove the statement made.—*In re Samiruddin*, I. L. R., 8 Calc., 211; (S. C.) 10 C. L. R., 11. The Chief Court of the Punjab has held, that a dying declaration made by signs given in response to questions put is admissible in evidence; but that in such a case it is essential that the statement should be a true record of what actually took place, and should show on the face of it the questions put and the nature of the signs made in reply.—*Bata* v. *Empress*, Punjab Rec., 1886, p. 2. See s. 32 of the Evidence Act and *Empress* v. *Abdullah*, I. L. R., 7 All. (F. B.), 386.

When any person whose evidence is essential to the conviction of a prisoner charged with the commission of a crime may be in imminent danger of dying before the case comes to trial, the deposition of the dying person should, if possible, be recorded in the presence of the accused or of attesting witnesses; and, in the event of his death, submitted at the trial with evidence of this fact.—*C. O. No.* 47, 31*st July* 1857; *Wilkins*, 2nd Edition, p. 9. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the memory of the witness who recorded the statement.—*Empress* v. *Samiruddin*, I. L. R., 8 Calc., 211; (S. C.) 10 C. L. R., 11.

When a Police-officer, making inquiry in any case, has reason to believe that a person whose statement may have an important bearing on the case is in a dangerous state and likely to die before the completion of the proceedings, or before his deposition can be taken on oath in presence of the accused before a Magistrate, he should be most careful first to ascertain, in the presence of respectable witnesses, the apparently dying man's impression of his own condition, and next, to take down his statement *verbatim*. See Instructions to Police-officers, *Bengal Police Manual*, p. 379.

163. No Police-officer or person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24. Ch. XIV s. 163

No inducement to be offered.

But no Police-officer or other person shall prevent, by any caution or otherwise, any person from making, in the course of any investigation under this chapter, any statement which he may be disposed to make of his own free will.

This section follows ss. 120 and 184 of Act X of 1872, specifying particularly the inducement, threat or promise, the offer of which it is sought to prohibit. The latter part of the section is more general than the corresponding sections, in so far that it applies to *any person*, and is not confined to the person arrested, as under Act X of 1872, but is confined to investigations under this chapter.

The Evidence Act (I of 1872) contains the following provisions as to confessions to Police-officers:—

Section 24.—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority [as to who is a person in authority, see *Reg.* v. *Navroji Dadabhai*, 9 Bom. H. C. R., 358, and *Empress* v. *Mohun Lall*, I. L. R., 4 All., 46] and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Section 25.—No confession made to a Police-officer shall be proved as against a person accused of any offence. See *Empress* v. *Mathews*, I. L. R., 10 Calc., 1022.

Section 26.—No confession made by any person whilst he is in the custody of a Police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Section 27.—Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police-officer, so much of such information, whether it amounts to a confession or not, as distinctly relates to the fact thereby discovered, may be proved.

Section 28.—If such a confession as is referred to in s. 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

A confession, when fairly made, is not inadmissible as evidence, simply because at the time it was taken no formal accusation had been made against the party making it —*Queen* v. *Ram Churn Chamar*, 4 W. R., Cr., 10. But where a disclosure or confession has been improperly obtained by a Police-officer, no part of his evidence as to the discovery of facts made in consequence of such disclosure or confession is legally admissible.—*Queen* v. *Dhurum Dutt Ojha*, 8 W. R, Cr., 13. In that case the prisoners made a confession on being told by the Police-officer that he would get them released if they spoke the truth. See *Bishoo Manjee*, 9 W. R., Cr., 16.

With reference to s. 26 of the Evidence Act it has been held, that the mere standing-by of a Magistrate when confessions are being made to and recorded by the police for their own purposes will not make these confessions evidence. But if the Magistrate is himself conducting the investigation, then, although the prisoner may be in the custody of the police at the time, the prisoner making a confession is liable to have that confession used against him.—*Reg.* v. *Domun Kahar*, 12 W. R., Cr., 82. Extorting a confession by torture is punishable under ss. 330, 331, and 348, and extorting or attempting to extort a confession by criminal intimidation, under s. 506 of the Indian Penal Code.

In Madras, the head of a village is a Magistrate within the meaning of this Act, and the confession of an accused person in the custody of the police, if made in his presence, is admissible as evidence.—*Mad. H. C. Pro.*, 14*th Feby.*, 1860; *Weir*, p. 14; see *Mad. H. C. Judgt.*, 18*th Sept.*, 1878; *Weir*, p. 15. So it was held that

Ch. XIV s. 163 a village Magistrate was not a Police-officer, and that a confession made to him was not inadmissible under s. 25 of the Evidence Act.—*Empress* v. *Samu Papi*, I. L. R., 7 Mad., 287.

Whenever a confession or admission of guilt is made by any person in the presence of a Magistrate so as to be admissible as evidence against such person, the Magistrate should specially record the circumstances under which the confession or admission of guilt was made, and in whose custody the person was at the time, and whether the confession or admission of guilt was freely or voluntarily made.—*Bom. H. C. Cir.*, 257.

In the case of *Queen* v. *Nabadwip Goswami*, 1 B. L. R., O. Cr., 20, PEACOCK, C. J., with reference to a statement made to a police constable when he arrested the prisoner, observed: "The answer did not amount to a confession of guilt, but was a statement of facts which, if true, showed that the prisoner was innocent. It is not a confession obtained under an inducement of hope or fear. The only objection to the statement being admissible as evidence is, that it was made in answer to a question put by the Police-officer.

"The cases upon this subject in England are conflicting, but the later cases seem to show that statements made by a prisoner in answer to a question put by a Police-officer are admissible in evidence. In the case of *Reg.* v. *Berreman*, 6 Cox, C. C., 388, ERLE, C.J., refused to admit as evidence an answer given by a prisoner to a question put to him by a Magistrate; and a similar ruling by WILDE, C.J., is to be found in the case of *Reg.* v. *Pettil*, 4 Cox, C. C., 164. But in a later case—*Reg.* v. *Cheverton*, 2 F. and F., 836,—ERLE, C. J., admitted as evidence against the prisoner a statement which she had made in answer to questions put to her by a Police-officer. In that case it appeared that Baxter, the Police-officer, had said to the prisoner—'You had better tell all about it, it will save the trouble;' and then put certain questions to the prisoner, which she answered. It was held, that the answers given to Baxter were inadmissible, because they had been made under the influence of something in the nature of a threat or inducement. Afterwards another policeman put questions to the prisoner, which she answered, and it was objected that those answers were inadmissible as they had been made under the inducement held out by the former Police-officer. ERLE, C. J., after consulting WIGHTMAN, J., admitted the statements made to the second Police-officer, holding, as I suppose, that the answers were not given in consequence of the inducement held out by the first officer. That is a distinct authority that statements made by a prisoner in answer to questions put by a Police-officer are admissible, and it may be remarked that in that case the answers were held to be admissible, although the prisoner had not been cautioned.

"In the case of *Reg.* v. *Mick*, 3 F. and F., 822, it was held by MELLOR, J., that the confession made by a prisoner in answer to a question put to him by a Police-officer was admissible. MELLOR, J., in the case of *Reg.* v. *Mick*, to which I have referred, remarked, that many Judges would not receive the evidence, and that he highly disapproved of the course the police had taken in asking questions.

"Having these conflicting decisions before us, I should be disposed to act upon the decision in the case reserved, even if it were not borne out by every principle of common sense. If an inducement is held out to a prisoner to make a confession by telling him that he will be better off if he makes a confession, he may be induced, if he knows that circumstances are strong to lead to a presumption of guilt, to make a confession although he is innocent. There may be reasonable grounds against the admission of such a confession, though perhaps it would be better to admit it and to leave those who have to determine as to the guilt or innocence of the prisoner to judge of the weight which ought to be attached to it. . . . I cannot at all agree with the remarks of MELLOR, J., and in the expression of his disapproval of the conduct of the Police-officer in asking questions, provided he does not hold out hope or fear as an inducement to confess.

"Some cases have gone to the extent of saying that a statement is not admissible if it is obtained by telling the prisoner he had better tell the truth. For my own part I cannot see any objection to telling every man that he had better tell the truth, but that is very different from telling a man that he had better confess when you do not know whether he is innocent or guilty. Though it has been held, in some cases, that confessions obtained by asking questions are not admissible, and although law is said to be the perfection of reason, it has been distinctly ruled in England, and I believe without a dissentient voice, that confessions obtained by artifice or

164. Where a confession given in Hindustani was taken before a Subdivisional magistrate and was recorded by the Court which in Bengali, that being the Court language. Held ~~that~~ the proceedings were conducted according to law

Lalchand v Queen Empress I.L.R 18 C 549.

See Joynarain Rai v. Queen Empress I.L.R 17 C 862

A magistrate acting under Criminal Procedure Code § 164 has power to administer an oath, and a charge of perjury can be framed with regard to statements made before him on oath when he is so acting

Queen Empress v. Alagu Kone I.L.R 16 mad 421

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deception are admissible." See *Reg.* v. *Navroji Dadubhai*, 9 Bom. H. C. R., 358; *Empress* v. *Mohan Lall*, I. L. R., 4 All., 46; *Empress* v. *Pandharinath*, I. L. R., 6 Bom., 34. Ch. XIV s. 164

A statement by a prisoner admitting guilt, overheard by a policeman in an adjoining room, the prisoner being ignorant of the policeman's vicinity, may be proved.—*Reg.* v. *Sageena*, 7 W. R., Cr., 56.

In the case of *Empress* v. *Uzeer*, I. L. R., 10 Calc., 775, where a Deputy Magistrate, before recording a confession, told the prisoner he had better tell the truth, it was held that the use of such language was calculated to hold out an inducement to the prisoner to confess, and that the confession taken was therefore inadmissible in evidence.

Power to record statements and confessions.

164. Any Magistrate not being a Police-officer may record any statement or confession made to him in the course of an investigation under this chapter, or at any time afterwards before the commencement of the inquiry or trial.

Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any confession, he shall make a memorandum at the foot of such record to the following effect:—

"I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,

Magistrate."

This section corresponds generally with s. 122 of Act X of 1872 and s. 16 of Act IV of 1877.

It specially limits the powers which it gives to Magistrates who are not Police-officers. Accordingly, Police-officers having magisterial powers will not be competent to record statements or confessions under this section. See *Queen* v. *Hurribole Chunder Ghose*, I. L. R., 1 Calc., 207.

The section is precise as to the time up to which, in the course of proceedings, a statement or confession may be recorded; it further provides, not that a confession shall be taken, but that it shall be recorded and signed. Like s. 122 of Act X of 1872, it contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is to be inquired into. See *Empress* v. *Anuntram Singh*, I. L. R., 5 Calc. (F. B.), 954; (S. C.) 6 C. L. R., 297; *Empress* v. *Yakub Khan*, I. L. R., 5 All., 253; *Queen* v. *Jetoo*, 23 W. R., Cr., 16; *In re Behari Hadji*, 5 C. L. R., 238; *Empress* v. *Munnoo Panioli*, 4 C. L. R., 137; (S. C.) [*nomine*] *Empress* v. *Mannoo Tamoolee*, I. L. R., 4 Calc., 696; *Reg.* v. *Shivya*, I. L. R., 1 Bom., 219; *Krishnomonee* v. *Empress*, 6 C. L. R., 289.

Ch. XIV s. 164 Accordingly, where it appeared that the Magistrate who recorded a confession was himself the Magistrate who conducted the inquiry preliminary to committal, and had jurisdiction so to do, the Court refused, notwithstanding that the Magistrate had noted that the confession had been taken under s. 122 of Act X of 1872, to treat the confession as taken under that section.—*Empress* v. *Anuntram Singh*, I. L. R., 5 Calc. (F. B.), 954; (S. C.) 6 C. L. R., 297. Such a confession, it was held, must be treated as an examination under s. 193 of Act X of 1872 (corresponding with s. 242 of this Act), notwithstanding that the prisoner might have been brought before the Magistrate before the conclusion of the police investigation.—*Ibid.* To such a confession the provisions of s. 346 of Act X of 1872 applied.—*Ibid.* The Full Bench in the last cited case distinguished the case of *Empress* v. *Mannoo Tamoolee*, I. L. R., 4 Calc., 696; (S. C.) [*nomine*] *Empress* v. *Munnoo Panioli*, 4 C. L. R., 137, where it appeared that though the Magistrate who recorded the confession subsequently conducted the preliminary inquiry, yet, at the time of recording the confession, he was outside the limits of his jurisdiction, and had no power to take up the preliminary inquiry.

In *In re Behari Hadji*, 5 C. L. R., 238, it was held, that s. 122 of the former Code applied also to a confession made during or before the commencement of an investigation by the police. See Schedule III (7), which gives power to a Magistrate of the third class to record confessions or statements during a police investigation under this section.

While s. 122 of Act X of 1872 provided that confessions should be *taken* in the manner provided by s. 346 (corresponding with s. 364 of this Act), this section expressly provides that such confessions shall be recorded and signed.

In the case of *Reg.* v. *Bai Ratan*, 10 Bom. H. C. R., 166, a Full Bench of the High Court at Bombay held, that a confession recorded under s. 122 of Act X of 1872 was inadmissible in evidence unless signed or attested by the mark of the accused. That case is now, as to this point, superseded by s. 533, *infra.* By that section it is expressly provided that where it appears, in recording any statement or confession of an accused person under this section (164) or s. 364 (*infra*), that the provisions of such sections have not been fully complied with, evidence may, notwithstanding s. 91 of the Evidence Act, I of 1872, be received that the accused duly made the statement recorded, provided the error has not injured the accused in his defence. The cases of *Reg.* v. *Omriti Govinda*, 10 Bom. H. C. R., 497; *Empress* v. *Anuntram Singh*, I. L. R., 5 Calc. (F. B.), 954; (S. C.) 6 C. L. R., 297; *Noshai Mistri* v. *Empress*, I. L. R., 5 Calc., 958; (S. C.) 6 C. L. R., 353; *Empress* v. *Mannoo Tamoolee*, I. L. R., 4 Calc., 696; (S. C.) [*nomine*] *Empress* v. *Munnoo Panioli*, 4 C. L. R., 137; *Empress* v. *Harikisto Biswas Bose*, 5 C. L. R., 209, are also superseded on this point by s. 533.

In the case of *Empress* v. *Sagambur*, 12 C. L. R., 120, the Court (McDonell and O'Kinealy, JJ.) expressed an opinion that an omission to record the questions put to an accused in taking his statement does not render such statement inadmissible.

It seems that an accused person who refuses to sign a statement or confession made by him commits no offence punishable under s. 180 of the Indian Penal Code.—*Empress* v. *Sirsapa*, I. L. R., 4 Bom., 15—the provision that the accused shall sign the record being nothing more than a direction to the Magistrate or Sessions Judge as to the manner of recording such examinations, and in no way casts any obligation on the accused.—*Ibid*, *per* Kemball, J. See *Reg.* v. *Bai Ratan*, 10 Bom. H. C. R., 166; *Reg.* v. *Apabin Kesu*, 10 Bom. H C. R., 181; *Reg.* v *Shivya*, I. L. R., 1 Bom., 219; and compare *Empress* v. *Ramanjiyya*, I. L. R., 2 Mad., 5. In the first of these cases, Westropp, C.J., said: —"It seems to me of the essence of such confessions and statements that they should be voluntarily made, and that they cannot be considered as complete until signed by the accused person."

Chapter XXV deals with the recording of evidence.

Where the statement or confession is made in a language other than that of the Court, it is not necessary that it should be recorded in that language. The language in which it is conveyed to the Court by the interpreter is the language in which it should be recorded.—*Empress* v. *Vaimbilee*, I. L. R., 5 Calc., 826.

'Upon questioning the person' making the confession, the Magistrate is only to put questions to the accused as to whether or not the confession was made voluntarily.—*Reg.* v. *Bai Ratan*, 10 Bom. H. C. R., 175.

The memorandum to be made under this section is fuller than that required under the corresponding section of the former Code. The latter sentence in the memorandum seems to have been inserted in accordance with the decision of the Bombay High Court in the case of *Reg.* v. *Shivya*, I. L. R., 1 Bom., 219. Ch. XIV s. 164

The Evidence Act, I of 1872, s. 80, provided that, whenever any document is produced before any Court purporting to be a statement or confession by any prisoner or accused person taken in accordance with law, and purporting to be signed by any Judge or Magistrate, the Court shall presume that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, is true; and that such statement or confession was duly taken.

This section (164) authorizes a Magistrate to record the statement of a person who appears before him as a witness, as well as the statement or confession of a person accused of an offence.—*Empress* v. *Malka*, I. L. R., 2 Bom., 643.

The practice of taking prisoners before a Magistrate not having jurisdiction in the case for the purpose of having a confession recorded is not generally desirable, but such a confession is legally admissible in evidence when duly proved.—*Reg.* v. *Vahala Jetha*, 7 Bom. H. C. R., Cr., 56.

A confession made by an accused person before a Magistrate who had jurisdiction to deal with the matter to which it related, might, it was held, be made the commencement of a trial or inquiry under Chap. XV of Act X of 1872 (Chap. XVIII of this Code), and be treated as a confession under s. 346 (s. 364 of this Code), whether or not the case was still under the investigation of the police.—*Krishnomonee* v. *Empress*, 6 C. L. R., 289.

A confession does not become inadmissible, merely because the memorandum required by law to be attached thereto by the Magistrate taking it has not been written in the exact form prescribed.—*Empress* v. *Bhairon Singh*, I. L. R., 3 All., 338.

It is not necessary for a Magistrate to caution a prisoner before recording a statement made by him.—*Proceedings*, *9th December* 1869; 5 Mad. H. C. R., Appx., xi; *Weir*, p. 8. There is, however, nothing in the law to prevent a Magistrate doing so.

The headman of a village, if a Magistrate, is entitled to act under this section. —*Proceedings*, *14th February* 1869; 4 Mad. H. C. R., 2; *Empress* v. *Sami Papi*, I. L. R., 7 Mad., 287.

See s. 346, *infra*.

The following rule as to confessions is in force in Madras :—

Whenever a Police-officer is about to depose to a confessional statement made by a prisoner to him while in his custody, he should be asked whether a Magistrate was present. If not, the confessional statement is inadmissible, except so far as it relates to a fact discovered thereby.—*Mad. H. C. Pro.*, *13th September* 1864; *Weir*, p. 8.

Joint trials.—In the case of *Empress* v. *Daji Narsu*, I. L. R., 6 Bom., 288, it was held, that to render the statement of one person tried jointly with another for the same offence admissible against that other, it was necessary that it should amount to a distinct confession of the offence charged. West, J., said :—" It is obvious that Govinda (one of the prisoners) did not intend to criminate himself. His intention is to exculpate himself and make Daji the murderer of Narsu. When a person admits guilt to the fullest extent and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth, and the Legislature provides (see s. 30 of the Evidence Act) that his statement may be considered against his fellow-prisoners charged with the same crime. By exculpating himself Govinda fails to provide this guarantee, and his statement must be set aside in weighing the evidence against Daji." See *Noor Bux Kazi* v. *Empress*, I. L. R., 6 Calc., 279; (S. C.) 7 C. L. R., 385.

The word " confession, " as used in the Evidence Act, must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt.—*Empress* v. *Jugrup*, I. L. R., 7 All., 647. Accordingly, unless the admission of a prisoner amounts to an admission of guilt, the statement made by him cannot be used against a co-prisoner.—*Ibid.*

One prisoner cannot be convicted on the confession of another prisoner without further evidence in corroboration.—*Empress* v. *Dosa Jeva*, I. L. R., 10 Bom., 231.

Ch. XIV s. 164 Section 30 of the Evidence Act makes an exception, and its wording shows that the confession is merely to be an element in the consideration of the offence. Unless there is something more, a conviction upon it will still be a case of no evidence, and bad in law.—*Mad. H. C. Pro.*, *24th January* 1873; *Weir*, p. 9.

A confessional statement made at the close of a trial is not a plea of guilty upon which the Judge can record a finding without taking the verdict of the jury or the opinion of the assessors. After a prisoner has once claimed to be tried, all the evidence, including the prisoner's admission, must be laid before them.—*Mad. H. C. Pro.*, *12th November* 1866; *Weir*, p. 8.

The following form was prescribed in Bengal for recording confessions of accused persons. Such confessions, it was pointed out, should invariably be recorded in the printed forms (supplied by the Superintendent of Stationery):—

STATEMENT OF ACCUSED PERSON.

The statement of , aged about years,
made before me , Magistrate of the class,
at , on the day of 188 :—
My name is ,
My father's name is
I am by caste , and by occupation
My home is at Mouzah , Thannah
District . I reside at

(*Signature or mark of accused.*)

The above statement was made in my presence and hearing, and contains accurately the whole of the statement made by the accused person. I believe that this confession was voluntarily made.

(*Signature of Magistrate.*)

—*Calc. H. C. C. O., No.* 3 *of* 24*th March* 1880; *Wilkins*, p. 72. (See now memo. under this section.)

Instructions regarding the recording of confessions.—It is desirable that Magistrates should act with deliberation in examining persons brought before them for the purpose of making confessions, and should, as far as possible, satisfy themselves that the confession is voluntary, and this not merely from the declaration of the accused, but from an attentive observation of his demeanour.—*Calc. H. C. C. O., No.* 3 *of* 24*th March* 1880; *Wilkins*, p. 2.

It is not proper to allow the Police-officer who brought the prisoner to be present while the confession is being recorded by a mohurir, and to suggest questions to be put to the confessing prisoner.—*Calc. H. C. C. O., No.* 7 of 30*th July* 1873; *Wilkins*, p. 2.

The following instructions have been issued by the Chief Court of the Panjab:—

(*a*) Statements of accused persons recorded under ss. 346 (364) and 122 (164) of the Criminal Procedure Code (Act X of 1872) must, whenever practicable, be recorded in the language in which they are made.

(*b*) When such language is not the language in ordinary use in the district in which the Court is held as determined by the Local Government under s. 337 (556), or the language prescribed by an order under s. 335 (357), the record of the statement must, in all appealable cases, be translated into English, where the Sessions Judge or Magistrate ordinarily writes his proceedings in English, and translations must be authenticated by the signature of the translator, and also of the Judge or Magistrate before whom the statement is made.—*Panjab Gazette*, 1878, Part III, p. 519.

The following rules also as to taking down confessions have been issued by the Chief Court of the Panjab:—

(1.) Every Magistrate about to record a confession under s. 122 (164) of the Criminal Procedure Code (Act X of 1872) shall write, in the language in which he ordinarily writes his judgments in criminal proceedings, a brief memorandum of the inquiry made by him, and which he is by law bound to make in order to ascertain that the accused person is acting voluntarily in making a confession.

(2.) The statement shall be fully and accurately written down in the language in which it is made by the accused person, and if not written by the Magistrate with his own hand, the Magistrate shall, as the examination proceeds, make a memorandum of it in the vernacular of the district, or in English, with his own hand and under his own signature. Ch. XIV s. 164

(3.) The Magistrate shall only question the accused person so far as may be necessary to enable the Magistrate to understand what the accused person's meaning is. Every question shall be written down in full, together with the answer.

(4.) When the accused person has concluded his statement, the written record of his statement shall be read out to or shown to him by, or in the presence of, the Magistrate, and any explanations or additions to it made by the accused person shall be written down in the manner above prescribed.

(5.) The Magistrate shall then desire the accused person to add his signature or mark. If the accused person decline to affix his signature or mark, the Magistrate shall state the fact, and the reasons, if any, assigned by the accused person for so declining.

(6.) The Magistrate shall then certify, under his own hand, that the statement of the accused person was made in his presence and in his hearing, and that the whole of the statement so made has been accurately recorded and attested (if such be the case) by the accused person.

(7.) The Magistrate shall then add the memorandum prescribed by s. 122 (164), and his own signature and description in full.

(8.) The Magistrate may state in writing any other circumstance attending the making or recording of the accused person's statement. Any such statement made by the Magistrate, if not embodied in the certificate, must be separately signed by him.

(9.) The record will then be forwarded to the Magistrate by whom the case is inquired into or tried.

(10.) In every case in which the record of a confession by an accused person taken under s. 122 is received by the Magistrate inquiring into or trying the case, the Magistrate shall inquire from the accused person whether he made the statement purporting to have been made by him before the Magistrate from whom the record of the confession was received. The statement shall be shown or read to the accused person, and the fact noted by the Magistrate; and the accused person's answer to the question shall be recorded in full.

DISTRICT.

IN THE COURT OF .

Queen-Empress v.

The confession of , taken by me , a Magistrate of the District. This day of 188 .

Memorandum of inquiry.

Mark or signature of accused (Signed)

Magistrate, Class.

Certified that the above confession was taken in my presence and hearing, and contains accurately the whole of the statement made by the accused [* and was attested by him as correct in my presence].

(Signed)

Magistrate, Class.

I believe that this confession was voluntarily made.

(Signed)

Magistrate, Class.

—*Panjab Gazette*, 1878, Part III, p, 272. (See now memo. under this section.)

The following rules were passed by the Bombay High Court under s. 292 of Act X of 1872:—

It is not desirable that the Police-officer making an investigation under Chap. X of the Code of Criminal Procedure (Chap. XIV of this Act) should be present when

* To be omitted if such be not the case.

Ch. XIV s. 165 confession is recorded under s. 122 (164) of the Code, nor should any Police-officer remain in the Magistrate's Court except such as may be necessary to secure the safe custody of the accused person. Under the direction contained in para. 6, page 27, of the High Court Circular Book, the Magistrate taking a confession should record whether the instructions contained in the present circular have been complied with. In all important criminal cases, and especially in cases of murder and dacoity, it is desirable that the Police-officer by whom the investigation has been conducted should be examined as a witness in regard to the circumstances of the investigation. Each Police-officer should bring with him his diary and also the memorandum (*tipun*) of the statements taken down by him under s. 119 (162) of the Code of Criminal Procedure. An extract from his diary should be invariably recorded in the case. The memorandum (*tipun*) should not be recorded, but should be used by the Police-officer to refresh his memory if he is questioned as to the statements made to him by the witnesses.—*Bombay Gazette*, 1881, p. 473.

Search by Police-officer.

165. Whenever an officer in charge of a Police-station, or a Police-officer making an investigation, considers that the production of any document or other thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate, and there is reason to believe that a person to whom a summons or order under section 94 has been or might be issued will not or would not produce such document or other thing as directed in the summons or order, or when such document or other thing is not known to be in the possession of any person, such officer may search, or cause search to be made, for the same, in any place within the limits of the station of which he is in charge, or to which he is attached.

Such officer shall, if practicable, conduct the search in person.

If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the document or other thing for which search is to be made, and the place to be searched; and such subordinate officer may thereupon search for such thing in such place.

The provisions of this Code as to search-warrants shall, so far as may be, apply to a search made under this section.

This section corresponds with s. 379 of Act X of 1872, substituting the words 'any document or other thing' for 'anything.'

Where the officer in charge of a Police-station, or officer making an investigation, is unable to conduct the search in person, a subordinate officer can only act under a written order, in which the thing for which the search is to be made and the place to be searched are specified.

Search by night is not illegal, but when the search can be delayed without danger to the chance of recovering property, &c., it should be postponed.—*Bengal Police Manual*, p. 322. Except under special circumstances, the search must be made between sunrise and sunset. If, for special reason, a search be

made between sunset and sunrise, such reason must be reported to the District Superintendent of Police for the information of the Magistrate having jurisdiction. If a search is required in any place within the limits of another station, it can only be made through the officer in charge of the latter, on the requisition, oral or written, of the former.—*Bengal Police Manual*, 2nd Edition, p. 402.

Under s. 12, Act V of 1861, it has been declared that the Extra Assistant Superintendents of Police, attached to a detective department, shall have the powers of officers in charge of Police-stations for the purpose of searching houses in each district where they may be employed. The Extra Assistants, while exercising these powers, can, under the terms of this section of the Criminal Procedure Code, by written order in any particular case, direct the head constables of the detective department, who are subordinate to them, to make search in any house or place.—*Government Order No.* 4714, *dated* 27*th July* 1869; *Bengal Police Manual*, 2nd Edition, p. 402.

Under s. 23 of Act V of 1861, it is lawful for every Police-officer, for the purposes mentioned in that section, without a warrant to enter and inspect any drinking shop, gaming-house or other place of resort of loose and disorderly characters; and under s. 23 of Act VII (B.C.) of 1864, any Police-officer may enter and inspect, at any time, by day or night, any salt work or any warehouse in which salt is stored. Section 153, *supra*, gives an officer in charge of a Police-station power to enter any place within the limits of the station for the purpose of inspecting weights and measures. See ss. 96—106, *supra*, as to search-warrants.

Officers in charge of Police-stations may also institute searches—1*st*, for contraband salt, &c. (s. 28, Act VII (Ben.) of 1864; Act I (Mad.) of 1882, ss. 21, 23; Act VII (Bom.) of 1873, s. 8; Act XII of 1882, ss. 15, 18): 2*nd*, for stamped paper not bearing the proper distinguishing mark, and not authenticated as having been purchased from Government (s. 7, Act XIX of 1858). Any Police-officer above the rank of head constable, and head constables in charge of outposts of the 1st and 2nd grade, may institute searches for excisable articles liable to confiscation under the Excise Acts.

No Police-officer shall be compelled to say whence he got any information as to the commission of an offence.—*Evidence Act, I of* 1872, *s.* 125.

When officer in charge of Police-station may require another to issue search-warrant.

166. An officer in charge of a Police-station may require an officer in charge of another Police-station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made within the limits of his own station.

Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

This section corresponds with s. 380 of Act X of 1872.

Procedure when investigation cannot be completed in twenty-four hours.

167. Whenever it appears that any investigation under this chapter cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation is well founded, the officer in charge of the Police-station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary

Ch. XIV s. 167 hereinaftar prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

If such order be given by a Magistrate other than the District Magistrate or Subdivisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

Under s. 124 of Act X of 1872, the Police-officer was directed, in cases where the investigation could not be completed in twenty-four hours, to forward the accused, with a statement of the offence for which he had been arrested, not to the nearest Magistrate, but to the Magistrate having jurisdiction. Instead of the statement of the offence, a Police-officer must now, in such circumstances, transmit a copy of the entries in the diary directed to be kept under s. 172, *infra*.

Magistrates of the third class, under their ordinary powers, have power to authorize detention of a person during a police investigation under this section.—*Sched. III* (8).

While a case was being investigated under this chapter by A, a Police-officer, T presented a petition to the Magistrate having jurisdiction to try the case, accusing W of being concerned in the commission of the offence, and prayed that he might be arrested and sent to the Police-officer investigating the case. W was accordingly arrested and brought before the Magistrate, who, having examined T on oath and taken W's statement, made an order in the petition to the following effect:—"As no police report has been made on this matter, and the petitioner only has presented this petition, ordered that these papers of W be sent to the District Superintendent of Police, and if a report of the matter be made, the case may be sent up according to rule with the papers." In accordance with this order, W was taken to the District Superintendent of Police, and was sent by that officer to A. A negligently allowed W to escape, and was tried and convicted under s. 222 of the Indian Penal Code, it being held that the order of the Magistrate might be taken to have been passed under s. 167 of the Code, and therefore that W was lawfully committed to the custody of the police, and that A was legally bound to retain him in custody until released therefrom by due course of law.—*Empress* v. *Ashraf Ali*, I. L. R., 6 All., 129.

Detention.—The retaining of a person in a particular place, or the compelling him to go in a particular direction, by force of an exterior will, overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of the person exercising that exterior will.—*Parankusam Narasaya Pantulu* v. *Stuart*, 2 Mad. H. C. R., 196. See *Bird* v. *Jones*, 7 Q. B., 742. In *The Queen* v. *Behary Singh*, 7 W. R., Cr., 3, MARKBY, J., said:—"At the expiration of twenty-four hours, unless the special order of the Magistrate has been obtained, the prisoner must either be discharged or sent to the Magistrate, and any longer detention is absolutely unlawful. . . . . Though this is not so express upon the place as the time of confinement, it is perfectly clear that it was intended that where a Police-officer arrested any person, the prisoner should not be kept in confinement in any place which the subordinate officer might select, but that he should, if possible, be sent immediately to the Police-station and be placed in the custody of the officer in

charge of the station, who is the person entrusted by the Act with the conduct of the inquiry" (p. 6). The time during which a person is kept in wrongful confinement is immaterial, except with reference to the extent of punishment of the person causing the wrongful confinement.—*Queen* v. *Suprosunno Ghosal*, 6 W. R., Cr., 88.

Wrongful confinement is punishable under s. 342 of the Penal Code. Section 340 of the same Code provides: "Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said 'wrongfully to confine' that person."

A Police-officer cannot be convicted under s. 29 of Act V of 1861 for detaining a person for over twenty-four hours, unless there has been a continuous detention for over that period of time (*Indrobee Thaba*, 1 W. R., Cr., 5); but any continuous detention for over twenty-four hours is punishable under that section.—*Bussoram Doss*, 19 W. R., Cr., 36.

Under s. 344, *infra*, also, a Magistrate cannot remand an accused person to custody for more than fifteen days at a time. At the expiration of twenty-four hours from the time of arrest, the accused *must* be brought before a Magistrate, and then no remand without a hearing can last for a longer period than fifteen days.—*Reg.* v. *Surkya Valad Dhaku*, 5 Bom. H. C. R., Cr., 31. See the note to that section.

See note to s. 61, *supra*.

Report of investigation by subordinate Police-officer.

168. When any subordinate Police-officer has made any investigation under this chapter, he shall report the result of such investigation to the officer in charge of the Police-station.

See s. 123, para. 2, of Act X of 1872. This section makes it imperative for a subordinate Police-officer, who has made an investigation under this chapter, to report the result to the officer in charge of the Police-station under s. 123, para. 2, of Act X of 1872. This was optional under the former Code, unless he were required by the officer in charge to submit a report.

The evidence should be sent in as found, and not kept by the police until they have made it all complete.—*Queen* v. *Kodai Kahar*, 5 W. R., Cr., 6.

No Magistrate or Police-officer shall be compelled to say whence he got any information as to the commission of an offence.—*Evidence Act, I of* 1872, *s.* 125.

Release of accused when evidence deficient.

169. If, upon an investigation under this chapter, it appears to the officer in charge of the Police-station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.

See s. 125 of Act X of 1872. That section further directed that a report should be submitted through a superior officer of police, who might, pending the orders of the Magistrate, give instructions as to the conduct of the investigation.

Sections 62 and 63 of this Act, *supra*, pp. 47, 48, provide for officers in charge of Police-stations reporting apprehensions made without warrant within the limits of their respective stations, and for the discharge of persons arrested.

Section 513, *infra*, provides that any person required by any Court or officer to execute a bond, with or without sureties, may, in lieu of executing such bond, deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix.

Ch. XIV s. 170

The Magistrate "empowered to take cognizance of the offence on a police report" would be any Presidency Magistrate, District Magistrate, Subdivisional Magistrate, or any other Magistrate specially empowered in that behalf.—*S.* 191, *infra.*

If the Police-officer finds that there is not sufficient evidence to justify the transmission of the accused, he shall release him on bail or recognizance, and shall submit a report through the proper officer for the orders of the Magistrate having jurisdiction.—*Smyth*, p. 83.

For form of bond and bail-bond on a preliminary inquiry before a Police-officer, see Sched. V, No. 25.

Case to be sent to Magistrate when evidence is sufficient.

170. If, upon an investigation under this chapter, it appears to the officer in charge of the Police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report, and to try the accused or commit him for trial; or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

When the officer in charge of a Police-station forwards an accused person to a Magistrate, or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant, if any, and so many of the persons who appear to such officer to be acquainted with the circumstances of the case, as he may think necessary, to execute a bond to appear before the Magistrate and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

If the Court of the District Magistrate or Subdivisional Magistrate be mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference be given to such complainant or persons.

The day fixed under this section shall be the day whereon the accused person is to appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody.

The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

The first paragraph of this section corresponds with para. 1 of s. 123 of Act X of 1872, with a new provision enabling Police-officers, in case of

offences that are bailable, to take security from the accused to appear before the Magistrate. Ch. XIV s. 170

The second paragraph corresponds generally with para. 1 of s. 127 of Act X of 1872, with a provision, which was contained in s. 123 of that Act, empowering the taking of a bond from the complainant and such persons as appear to be acquainted with the circumstances of the case for their appearance. See also paras. 1, 2, 3, and 4 of s. 130 of the same Act.

The Magistrate empowered to take cognizance of the offence on a police report and to try or commit the offender for trial would be any Presidency Magistrate, District Magistrate, Subdivisional Magistrate, or any other Magistrate specially empowered in that behalf.—*S.* 191, *infra.*

In a preliminary inquiry before a Magistrate, evidence should be sent in as found, and not kept by the police until they have made it all complete.—*Queen* v. *Kodai Kahar*, 5 W. R., Cr., 6.

When a District Superintendent, on looking into the case, finds that any witnesses have been unnecessarily sent in, he will at once report the circumstance to the Magistrate, in order that the witnesses may be discharged before the trial, should the Magistrate think proper. When such witnesses are dismissed, District Superintendents should inform the Police-officer who sent up the case, and point out the reasons of their not being required, thereby instructing him in his duty.—*Bengal Police Manual*, 2nd Edition, p. 382.

If, after investigation, the Police-officer finds sufficient evidence against the accused person, he must report the case to the Magistrate having jurisdiction.—*Smyth*, p. 84.

As to the procedure on forfeiture of a bond, see ss. 514, 515, and 516, *infra.*

Where a Magistrate thinks proper to escheat the recognizances of persons who have undertaken to appear to give evidence, and have failed, without just cause, to appear, and have thus created an obstruction to public justice, he ought to allow such persons an opportunity of justifying their default.—*Queen* v. *Dassoo Manjee*, 11 W. R., Cr., 39.

The following rules for the payment of the expenses of accused persons and witnesses previous to trial are in force in the Panjab:—

1. District Superintendents of Police receive a permanent advance from the treasury to supply the police with the means of paying the diet of witnesses and prisoners, previous to a police case being launched in the Judicial Courts, and any other contingent expenditure which may have been incurred.

2. The police will provide for the diet of witnesses up to, and inclusive of, the day on which the charge sheet is handed over to the Judicial Court; and of the prisoner up to, and inclusive of, the day on which he is made over to the judicial lock-up.

3. At the time of presenting the charge sheet, the police will move the Judicial Officer to pass the sums disbursed by the police in that particular case. The full sum advanced will always stand to the personal debit of the District Superintendent, who will make his own arrangements under departmental orders with his subordinates.

4. No running accounts are to be allowed; as the contingent bills of the police are passed, they will receive the amount in full.

5. The police will have nothing to do with the diet of witnesses or of defendants, in cases which are instituted in the Judicial Court, on the petition of the parties or the motion of the Court. The agency of the police may be used to summon such witnesses and defendants; but if the parties are entitled to diet from Government, the Magistrate must direct his own nazir to pay them.—*Smyth*, p. 122.

The Police-officer should bind the accused, the complainant, and his witnesses to appear before the Magistrate within a reasonable time. In the case of *Queen* v. *Bheem Manjee*, 6 W. R., Cr., 52, it was held, that a Police-officer was not at liberty to bind witnesses over to appear a month after date.

For form of bond to prosecute or give evidence, see Sched. V, No. 26.

When an arrest is made by a private person, the Police-officer to whom he makes over the person arrested may search such person and place in safe custody all articles other than necessary wearing apparel found upon him.—*S.* 51, *supra*, p. 38. See s. 53, *supra*, p. 39, as to offensive weapons found upon a person arrested under Chap. V.

Ch. XIV secs. 171-172

Property transmitted to the Magistrate under this section is to be retained by the police pending the disposal of the case. When the case is decided, the property, if not returned to the owner, is to be made over to the nazir for safe custody. If it is of great value, and consists of bullion, coin or jewels, it should be made over to the treasurer.—*Smyth*, p. 88.

Complainants and witnesses not to be required to accompany Police-officer.

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a Police-officer,

Complainants and witnesses not to be subjected to restraint.

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond:

Recusant complainant or witness may be forwarded in custody.

Provided that, if any complainant or witness refuses to attend or to execute a bond as directed in section 170, the officer in charge of the Police-station may forward him under custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

Under the last clause of s. 130 of Act X of 1872, it was provided that no Police-officer should accompany the complainant or his witnesses on his or their way to the Court of the Magistrate. It seems to have been found that, in many jungly and uninhabited places, the complainant and his witnesses were often glad to avail themselves of the escort and protection of the police, and accordingly the first clause of this section provides merely, that they shall not be required to accompany the police, but there appears to be nothing in the section to prevent their doing so.

The second and third clauses of this section correspond with s. 131 of Act X of 1872.

Disobedience to the directions of this section with intent to cause injury to any person, or with the knowledge that it is likely to cause such injury, is punishable under s. 166 of the Indian Penal Code.

Diary of proceedings in investigation.

172. Every Police-officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them, merely because they are referred to by the Court; but if they are used by the Police-officer who made them to refresh

172. Statements to witnesses recorded by Police Officers investigating under chap of Crim. P. Code. Police Diaries —

The privilege of section 172 Crim. P. Code does not extend to stat. taken under § 161, but recorded in the diary made under section 172

Shoru Oha v. The Queen Empress
I. L. R. 20 C. 6[illegible]

his memory, or if the Court uses them for the purpose of contradicting such Police-officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply. Ch. XIV s. 173

This section corresponds with s. 126 of Act X of 1872. It does not apply to the police in Calcutta and Bombay. But under s. 44 of Act V of 1861, all Police-officers in charge of a native are required to keep a diary, and the Magistrate of the District is authorized to call for and inspect it.

Sections 161 and 145 of the Evidence Act, I of 1872, are as follows:—

Section 161.—Any writing referred to under the provisions of the two last preceding sections (as to refreshing memory) must be produced and shown to the adverse party if he requires it. Such person may, if he pleases, cross-examine the witness thereupon.

Section 145.—A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, and relevant to matters in question without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Sections 159 and 160 of the Evidence Act are also important.

In giving evidence, a Police-officer may refresh his memory by referring to documents in which he has reduced into writing statements of persons examined by him during an investigation, but the documents themselves cannot be read as evidence; and a Judge cannot read such documents to a jury in order to point out the discrepancies between the evidence and previous statements of the witnesses.—*Roghuni Singh* v. *Empress*, I. L. R., 9 Calc., 455.

A prisoner has no right to insist that a Police-diary, if not in Court, shall be sent for, or, if it be in Court, that it be referred to for the purpose of refreshing the memory of a Police-officer under examination. The right is the right of the Court.—*In re Kali Charn Chunari*, 10 C. L. R., 51; (S. C.) I. L. R., 8 Calc., 154. In that case, Wilson, J., remarked: "I know of no authority for saying that a witness can be compelled to refresh his memory from any document, unless the document is either in the possession of the party who desires to put it to the witness, or is at least such as he can insist on having produced."

A Police-officer making an investigation is bound to record his proceedings day by day in a diary. The Magistrate of the District should see that the diary is regularly kept up, and that each day's diary has been forwarded to, and has regularly reached, the District Superintendent in course of post, this being the only security against the contents being ante-dated.—*Smyth*, p. 84. See Police Rules in the Panjab, dated 13th February 1885.—Punjab Record, 1885, Police Cir., p. 3. See further as to the duties of Magistrates in supervising the police.—*Ibid.*

See notes to ss. 154 and 169, *ante*, pp. 129, 149.

Report of Police-officer.

173. Every investigation under this chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the Police-station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the information, and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused person has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties.

Ch. XIV s. 174

"Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the Local Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the Police-station to make further investigation." [Act X of 1886, s. 7.]

Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

This section, to some extent, corresponds with ss. 125 and 127 (paras. 1 and 2) of Act X of 1872.

The provision contained in the latter section, directing the transmission of any weapon or article which it may be necessary to produce before the Magistrate, will be found in s. 170, *supra*, p. 150. The amendment by Act X of 1886 gets rid of what seemed to be a conflict between this section and s. 158, *supra*, as to whether a report should be submitted through a superior officer. The matter is now left to the Local Government.

See also ss. 51 and 53, *supra*, pp. 38, 39.

For form of report of investigation in Burma, see *Burma Gazette*, 1873, Part II, p. 7.

Police to inquire and report on suicide, &c.

174. Every officer in charge of a Police-station, on receiving information that a person—

(*a*) has committed suicide, or

(*b*) has been killed by another, or by an animal, or by machinery, or by an accident, or

(*c*) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the Local Government or by any general or special order of the District or Subdivisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

The report shall be signed by such Police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Subdivisional Magistrate.

Sections 174, 175 & 176 of the Code of Criminal P. shall in their application to the area comprised within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Madras, be read as ~~[illegible]~~ see Act V of 1889 section 4.

When there is any doubt regarding the cause of death, or when for any other reason the Police-officer considers it expedient so to do, he shall, subject to such rules as the Local Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other medical officer appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless. Ch. XIV s. 174

In the Presidencies of Fort St. George and Bombay investigations under this section may be made by the Head of the village, who shall then report the result to the nearest Magistrate authorized to hold inquests.

The following Magistrates are empowered to hold inquests,—namely, any District Magistrate or Subdivisional Magistrate, and any Magistrate specially empowered in this behalf by the Local Government or the District Magistrate.

This section corresponds generally with s. 133 of Act X of 1872, *specifying* the particular Magistrates to whom intimation must be given.

While this chapter generally does not apply to the police in Calcutta and Bombay, nothing in this and the two next following sections applies to the police in Madras.—*S.* 1 (*e*), *supra*.

Every village headman, village watchman, village Police-officer, owner or occupier of land, or the agent of such occupier, and every officer employed in the collection of revenue or rent of land, on the part of Government or the Court of Wards, shall forthwith communicate to the nearest Magistrate, or to the officer in charge of the nearest Police-station, whichever *is* nearer, any information which he may obtain respecting the occurrence of any sudden or unnatural death under suspicious circumstances.—*S.* 45, *supra*, p. 34.

For the rules as to *post mortem* examinations, see Bengal Police Circulars, 1870, pp. 59–62.

The following circular has been issued with regard to inquiries into cases of unnatural death:—

The Lieutenant-Governor does not think that special diaries are intended or necessary in all cases of inquiry into unnatural deaths. The report prescribed in s. 133 of the Criminal Procedure Code (s. 174 of this Act) is very much the same in character as the special diary of (s. 126.) If the Police-officers investigating see reason to suspect *crime*, the inquiry becomes one under s. 126, and special diaries become, as a matter of course, necessary; but, in ordinary cases, in which the inquiry is made and completed in a few hours, there seems to be no necessity for reporting the facts, first in a special diary, and then in the report prescribed by (s. 133.) When, however, the inquiry is prolonged, or lasts over more than one day, the diary should be sent to inform the District Superintendent and Magistrate of what is going on.

2. The Lieutenant-Governor would, therefore, rule, that in cases of any complexity, or in which the inquiry lasts over one day, or in which crime is suspected, special diaries should be sent in anticipation of the final report, which will be made under (s. 127) if a crime is detected, and under s. 133 (s. 174) if the death is from accident or natural causes. It is to be understood that, in the Station-diary, everything done by the police will be entered. The above orders apply only to the copies or special diaries sent in to headquarters.—*Bengal Police Circular*, 1872, p. 107.

In Madras, all commissioned medical officers, all warrant medical officers, and all hospital assistant medical officers were authorized to examine bodies forwarded to them for that purpose under the provisions of the corresponding section of Act X of 1872.—*Notification, Dec.* 11*th*, 1874; *Madras Gazette*, 1874, p. 1834.

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. The hospital assistants in charge of the dispensaries at Supa, Halial, Yelapur, Mundagod, and Honore have been appointed medical officers to conduct *post mortem* examinations.—*Bombay Gazette*, 1874, p. 338.

For the rules for the guidance of medical officers in conducting *post mortem* examinations, and examining wounded persons, see Cir. No. 1353 of 23rd April 1868; *Bombay Gazette*, 1873, p. 947.

For the rules with reference to *post mortem* and medico-legal examinations in force in the Panjab, see *Panjab Gazette*, 9th July 1874, Part III, p. 274.

Power to summon persons.

175. An officer in charge of a Police-station may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions, other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture.

If the facts do not disclose a cognizable offence to which section 170 applies, such persons shall not be required by the Police-officer to attend a Magistrate's Court.

This section corresponds with s. 134 of Act X of 1872, inserting the word 'truly;' see note to s. 161, *supra*. It does not apply to the police in Madras.—*S.* 1 (*e*), *supra*.

The order in writing may be in a prescribed form and lithographed.—*Smyth*, p. 85.

The issuing of a warrant or summons properly so called in criminal cases is the prerogative of the Magistrate only, and no writ from a Police-officer as such is to bear either of these designations.—*Ibid.*

Non-attendance in obedience to an order under this section is punishable under s. 174; and refusal to answer questions, other than questions tending to criminate, under s. 179 of the Indian Penal Code.

If a person knowingly answers falsely, he commits the offence of giving false evidence in a stage of a judicial proceeding under s. 193 of the Indian Penal Code.—*Empress* v. *Parshram Ray Sing*, I. L. R., 8 Bom., 216; *Nathu Sheik* v. *Empress*, I. L. R., 10 Calc., 405.

Inquiry by Magistrate into cause of death.

176. When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 174, clauses (*a*), (*b*), and (*c*), any Magistrate so empowered may hold an inquiry into the cause of death, either instead of, or in addition to, the investigation held by the Police-officer; and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed, according to the circumstances of the case.

Power to disinter corpse.

Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

Under s. 135 of Act X of 1872, with the first part of which this section corresponds generally, the nearest Magistrate duly authorized under that Act to enquire into the cause of death was empowered to act. This section provides that, except in the case of a person dying while in the custody of the police, not only the nearest Magistrate empowered to hold inquests, but any Magistrate so empowered, shall make inquiry into the cause of death.

The last para. of this section is new. See the Coroners' Act, IV of 1871, s. 11.

The section does not apply to the police in Madras.

As in s. 135 of Act X of 1872, there is nothing in this section requiring the Magistrate, who holds an inquiry, to draw up a report, embodying the result of the inquiry, and submit the same to the Magistrate of the District.—*In re Troylokanath Biswas*, I. L. R., 3 Calc., 742; (S. C.) 3 C. L. R., 59. Where such a report is made, it is not a judicial proceeding, and therefore the High Court, it was held, under s. 296 of Act X of 1872, had no power to send for it.—*Ibid.*

Proceedings under this section, it is now declared by s. 435, *infra*, are not proceedings within the meaning of that section.

PART VI.

PROCEEDINGS IN PROSECUTIONS.

CHAPTER XV.

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.*

A.—Place of Inquiry or Trial.

Ordinary place of inquiry and trial.

177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

See s. 63, para. 1, of Act X of 1872, which provided that every offence, if triable by a Magistrate, should be tried in the district in which it was committed. See also s. 18, para 1, of Act IV of 1877. Nothing, however, in this Code affects any special jurisdiction conferred.—*S.* 1, *supra.* See s. 531, *post.*

Section 101 of the Mutiny Act does not deprive the Criminal Courts of jurisdiction over British soldiers committing offences within the territorial limits

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* Under s. 156, *supra*, any officer in charge of a Police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of this chapter relating to the place of inquiry or trial.

But no proceeding of a Police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

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of such Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief. It is merely permissive of a military trial being held.—*In re Felix Maguire*, 4 C. L. R., 432; (S. C.) I. L. R., 5 Calc., 124.

This section does not apply to an application for maintenance.—*Hildephonsus* v. *Malone*, Panjab Rec., 1885, p. 26.

See s. 549, *post*.

An order of a Magistrate committing a case to the Court of Sessions, it was held, is an order of a Criminal Court within the meaning of s. 531, *post;* and if such order, contrary to the requirements of this section, directs the commitment to be made to a Court of Sessions, which has no territorial jurisdiction, it is not to be set aside unless it appears that the error occasioned a failure of justice.—*Empress* v. *Thaker*, I. L. R, 8 Bom., 312.

Power to order cases to be tried in different Sessions Divisions.

178. Notwithstanding anything contained in section 177, the Local Government may direct that any cases or class of cases committed for trial in any district may be tried in any Sessions Division:

Provided that such direction be not repugnant to any direction previously issued under the twenty-fourth and twenty-fifth of Victoria, chapter 104, section 15, or under this Code, section 526.

See s. 63, para. 2, of Act X of 1872; the last clause is taken from Act XI of 1874, s. 9.

The Local Government has no power under this section to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon; but it has power to transfer a case from the District of Rangoon to the Sessions Division of Pegu.—*Empress* v. *Nga Tha Moung*, I. L. R., 10 Calc., 643.

As to power of a High Court to transfer cases, see ss. 267 and 526.

Accused triable in district where act is done, or where consequence ensues.

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

Illustrations.

(*a.*) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried either by X or Z.

(*b.*) A is wounded within the local limits of the jurisdiction of Court X, and is during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z.

(*c.*) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

This section corresponds with s. 65 of Act X of 1872 and s. 19 of Act IV of 1877.

It includes, it seems, cases in which a person is accused of the commission of an offence by reason of anything which has been omitted to be done, for by s. 4 (*w*), *supra*, words which refer to acts done extend also to illegal omissions.

The illustrations, with slight necessary alterations, correspond with the illustrations to the corresponding sections of the former Acts.

Under this and the following sections, a Magistrate should act solely with reference to the public convenience. Ordinarily, the proper district for the inquiry and trial of offences falling under these sections would be the district in which the witnesses could, with the least inconvenience, attend. If the Magistrate be of opinion that the inquiry or trial can be more conveniently held in another district, he should at once address the Magistrate of that district. If the Magistrate of that district concur, the case will be transferred. If he dissent, the question may be referred to the Chief Court; and the Court under the provisions of s. 185 (s. 69 of Act X of 1872) will decide in which district the enquiry or trial shall be held. If the transfer is proposed by a Subordinate Magistrate, the application should be submitted through the Magistrate of the District, who will, if he considers the transfer desirable, forward it with his own recommendation to the Magistrate of the district in which he thinks the case should be tried.—*Smyth*, p. 73.

Whenever any doubt arises as to the Court by which any offence should, under the preceding provisions of this chapter, be inquired into or tried, the High Court within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be inquired into or tried.

In British Burma, when the offender is an European British subject, the Recorder of Rangoon, and, in all other cases, the Judicial Commissioner, shall, for purposes of this section, be deemed to be the High Court.—*S.* 185, *post.*

See *Mohesh Day* v. *Empress*, Panjab Record, 1885, p. 92.

Place of trial where act is offence by reason of relation to other offence.

180. When an act is an offence by reason of its relation to any other act which is also an offence, or which would be an offence if the doer were capable of committing an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Illustrations.

(*a.*) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(*b.*) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(*c.*) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits of whose jurisdiction the kidnapping, took place.

This section corresponds with s. 66 of Act X of 1872, with slight alterations. See also Act IV of 1877, s. 144.

'Act' here includes also illegal omissions.—*S.* 4 (*w*), *supra*, p. 6.

An important case bearing upon this section was decided by the High Court of Bombay under s. 67 of the former Code (X of 1872). There dacoity had been committed outside the British territory, but part of the stolen property had been found concealed by the accused in British territory. The Sessions Judge, who considered that he had jurisdiction under the section to try the accused for dacoity, convicted them of that offence. On a reference, the High Court thought that the conviction of dacoity could not be sustained, and altered the conviction to one

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of retaining stolen property known to have been obtained by dacoity. They said: "Had Velampor (where the dacoity took place) been in British territory, the subsequent acts in the process of taking away the property might, in the legal sense, as they would have the same legal character, have coalesced with the first and principal one so as to give jurisdiction under s. 67 of the Code of Criminal Procedure."—*Reg.* v. *Lahya Govind*, I. L. R., 1 Bom., 50.

The High Courts of Madras and Calcutta have also decided in a similar manner.—*Reg.* v. *Adivigadu*, I. L. R., 1 Mad., 171; *Empress* v. *Sunker Gope*, I. L. R., 6 Calc., 307; (S. C.) 7 C. L. R., 411. In the latter case, a Nepaulese subject, having stolen cattle in Nepaul, brought them into British territory, and it was held, that although he could not be tried for the theft itself, he might be convicted of dishonestly retaining the stolen property. See also *Reg.* v. *Bechar Mava*, 4 Bom. H. C. R., Cr., 38, and *Reg.* v. *Adivigadu*, I. L. R, 1 Mad., 171; and *Mad. H. C. Pro.*, *4th March* 1875; *Weir*, p. 21; *Mad. H. C. Pro.*, *22nd Feb.* 1879; *Weir*, p. 21.

Where a foreign subject resident in foreign territory instigated the commission of an offence, which in consequence was committed in British territory, it was held, that the instigation not having taken place in any district created by the Code of Criminal Procedure, the instigator was not amenable to the jurisdiction of a British Court established under that Code.—*Reg.* v. *Pirtai*, 10 Bom. H. C. R., 356.

The charge of dishonestly receiving or retaining stolen property in British India may be tried in British India, although the theft had been committed outside British India, as property which has been stolen now comes under the designation of "stolen property," whether the theft was committed within or without British India.—Act VIII of 1882, s. 4, which amends s. 410 of the Indian Penal Code.

Being a thug or belonging to a gang of dacoits, escape from custody, &c.

181. The offence of being a thug, of being a thug and committing murder, of dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is.

Criminal misappropriation and criminal breach of trust.

The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received by the accused person, or the offence was committed.

Stealing.

The offence of stealing anything may be inquired into or tried by a Court within the local limits of whose jurisdiction such thing was stolen or was possessed by the thief or by any person who receives or retains the same, knowing or having reason to believe it to be stolen.

The first and second parts of this section embody the provisions contained in illustrations (*c*) and (*d*) of s. 67 and in s. 68 of Act X of 1872. See also Act IV of 1877, s. 43.

The last paragraph follows illustration (*f*) of the former section of that Act, which was as follows:—"A steals a buffalo from B in district W, and personally or by his agents conveys the buffalo through districts X and Y into district Z. This is a continuing offence, and A may be tried either in W, X, Y, or Z." It is, however, more general, and would seem to be wide enough, to allow the

Courts here to inquire or try an offence of stealing which had taken place without British India, provided the property stolen were possessed within their jurisdiction by the thief, or by a person who received or retained it, knowing or having reason to believe it to be stolen. Under the former Code it was held, that where the theft took place in foreign territory, and the property stolen was brought into British territory, the Courts in the latter could not try the offence of theft.—*Reg.* v. *Adivigadu*, I. L. R., 1 Mad., 171; *Reg.* v. *Lakya Govind*, I. L. R., 1 Bom., 50; *Empress* v. *Sunker Gope*, I. L. R., 6 Calc., 307; (S. C.) 7 C. L. R., 411.

Section 188 deals with offences committed by British subjects out of British India.

The general rule of international law is, that no Court has jurisdiction over foreigners in respect of offences committed in a foreign State. See *Reg.* v. *Pirtai*, 10 Bom. H. C. R., 356; *Reg.* v. *Bechar Mava*, 4 Bom. H. C. R., 38; *Reg.* v. *Adivigadu*, I. L. R., 1 Mad., 171. See also *Reg.* v. *Keyn*, L. R., 2 Exch. Divn., 63.

See note to s. 179, *supra*, p. 158.

Under the present Code, where the accused, a subject of a Native State, committed theft at Rajkot Civil Station, which is not part of British India within the meaning of Statute 21 and 22 Vic., Cap. 106, and was found in possession of the stolen property at Thana, it was held that, as the accused was the subject of a Native State, and as the offence was not committed in British India, the Sessions Court at Thana had no jurisdiction to try the accused for the offence of theft; but it was competent to try him for dishonest retention of stolen property under s. 410 of the Indian Penal Code, as amended by Act VIII of 1882.—*Empress* v. *Abdul Sahib Abdul Rahiman*, I. L. R., 10 Bom., 186; see *Alu* v. *Empress*, Panjab Rec., 1883, p. 4. See also s. 458, *post*, and the notes thereto.

Where there was a conversion of goods at G, a foreign port, the goods having been entrusted to the accused to be carried from a port in British India to a port in British India, it was held that the Court at the port where the goods were entrusted to the accused had no jurisdiction to try him. It was also held that no offence was committed on the High Seas so as to give the Court jurisdiction under 12 and 13 Vic., Cap. 96, extended by 23 and 24 Vic., Cap. 88.—*Bapu Daldi* v. *Queen*, I. L. R., 5 Mad., 23. See also *Siddha* v. *Biligiri*, I. L. R., 7 Mad., 354.

Escape from custody.—Section 223 of the Indian Penal Code applies only to cases where the person, who is allowed to escape, escapes from custody for an offence, or has been committed to custody, and not to cases where such person has merely been arrested under civil process.—*Empress* v. *Tafaullah*, I. L. R., 12 Calc., 190. See *Queen* v. *Bojjigan*, I. L. R., 5 Mad., 22.

Place of inquiry or trial where scene of offence is uncertain,

182. When it is uncertain in which of several local areas an offence was committed, or

or not in one district only;

where an offence is committed partly in one local area and partly in another, or

or where offence is continuing,

where an offence is a continuing one, and continues to be committed in more local areas than one, or

or consists of several acts.

where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

This is s. 67 of Act X of 1872, omitting the illustrations and using the words 'local area' for 'district.' It was also incorporated as s. 21 of Act IV of 1877.

The illustrations to s. 67 of the former Act were as follows:—

(*a.*) An offence committed on a journey or voyage may be inquired into and tried in any district through which the person by whom the offence was committed,

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or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage. (See next section.)

(*b.*) An offence committed near the boundary between two districts may be inquired into and tried in either.

(*c.*) A charge of being a thug, or of having belonged to a gang of dacoits, may be inquired into and tried, wherever the person charged happens to be when the charge is made. (See preceding section.)

(*d.*) A charge of having escaped from custody may be inquired into and tried wherever the person charged happens to be when the charge is made.

(*e.*) A charge of criminal misappropriation or of criminal breach of trust may be inquired into and tried either in the district in which the property which is the subject of the offence was received, or in the district or districts in which the whole or any part of it has been misappropriated, or where the offence of criminal breach of trust has been wholly or partly committed. (See preceding section.)

(*f.*) A steals a buffalo from B in district W, and personally or by his agents conveys the buffalo through districts X and Y into district Z. This is a continuing offence, and A may be tried either in W, X, Y, or Z. (See preceding section.)

The Madras High Court has held, that an offence is not a continuing one unless a British Indian Court has jurisdiction at the place of the inception of the offence.—*Mad. H. C. Pro.*, 31*st Oct.* 1876, *Weir*, p. 21.

Offence committed on a journey.

183. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

This section corresponds with illustration (*a*) to s. 67 of Act X of 1872. In *Queen* v. *Abdul Ali*, 25 W. R., Cr., 45, where property was stolen during a short halt in the course of a journey, it was held that the persons charged with the offence could be tried at the place of destination.

So, where an offence was alleged to have been committed during a journey from Bombay to Calcutta, and was in fact committed between Bombay and Allahabad, at which latter place the complainant and the person by whom the offence was alleged to have been committed separated and proceeded to Howrah by different trains, it was held that the Magistrate of Howrah had no jurisdiction to try the charge. To bring the matter within his jurisdiction, it was said that the journey should have been continuous from one terminus to the other without any interruption by either party.—*Reg.* v. *Piran*, 13 B. L. R., Appx., 4; (S. C.) 21 W. R., 64, following *Queen* v. *Malony*, 1 Mad. H. C. R., 193.

An offence is not a continuing offence unless a British Indian Court has jurisdiction at the place of the inception of the offence.—*Mad. H. C. Pro.*, 31*st Oct.* 1876, *Weir*, p. 21.

In *Queen* v. *Malony*, 1 Mad. H. C. R., 193, the accused was charged with having been at Madras in a state of intoxication whilst actually employed upon the Madras Railway. It appeared that the accused had been removed from his post at a place outside the local limits of the High Court, although the train thereupon proceeded with him to Madras. It was held that the High Court had no jurisdiction to try the accused.

Offences against Railway, Telegraph, Post-office and Arms Act.

184. All offences against the provisions of any law for the time being in force relating to Railways, Telegraphs, the Post-office or Arms and Ammunition may be inquired into or tried in a Presidency-town, whether the offence is stated to have

been committed within such town or not: Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town.

This section corresponds with ss. 238 and 239 of Act IV of 1877.

The law relating to Railways is Act IV of 1879; to Telegraphs, Act I of 1876; to the Post-office, Act XIV of 1866; and to Arms and Ammunition, Act XI of 1878.

High Court to decide, in case of doubt, district where inquiry or trial shall take place.

185. Whenever any doubt arises as to the Court by which any offence should, under the preceding provisions of this chapter, be inquired into or tried, the High Court, within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be inquired into or tried.

In British Burmah, when the offender is an European British subject, the Recorder of Rangoon, and in all other cases the Judicial Commissioner, shall, for the purposes of this section, be deemed to be the High Court.

The first part of this section corresponds with s. 69 of Act X of 1872 and s. 2 of Act IV of 1877. The second part is new.

See notes to s. 179, *supra*, p. 158.

Power to issue summons or warrant for offence committed beyond local jurisdiction.

186. When a Presidency Magistrate, a District Magistrate, a Subdivisional Magistrate, or, if he is specially empowered in this behalf by the Local Government, a Magistrate of the first class, sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without British India) an offence which cannot, under the provisions of sections 177 to 184 (both inclusive), or any other law for the time being in force, be inquired into or tried within such local limits, but is, under some law for the time being in force, triable in British India, such Magistrate may inquire into the offence as if it had been committed within such local limits, and compel such person, in manner hereinbefore provided, to appear before him,

Magistrate's procedure on arrest.

and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is bailable, take a bond with or without sureties for his appearance before such Magistrate.

When there are more Magistrates than one having such jurisdiction, and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom

Ch. XV secs. 187-188 such person should be sent, or bound to appear, the case shall be reported for the orders of the High Court.

The first part of this section corresponds substantially with s. 157 of Act X of 1872 and s. 54 of Act IV of 1877. As to the last clause, see s. 174 of Act X of 1872 and s. 55 of Act IV of 1877; see also Act XXIII of 1840, s. 7.

A Magistrate of the first class may be invested under this section with power to issue process for persons within the local limits of his jurisdiction who have committed an offence outside the local jurisdiction.—*Sched. IV* (6).

If any Magistrate, not empowered by law, erroneously, in good faith, issues process under this section for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits, his proceedings will not be set aside merely on the ground of his not being so empowered.—*Section* 529 (*d*), *infra.*

In the Panjab, Magistrates of the first class had power, subject to the general control of the Magistrate of the District, to issue process for persons within the jurisdiction who have committed an offence outside the Magistrate's local jurisdiction.—*Panjab Gazette*, 1873, p. 361.

It is not essential to the validity of the process issued that the Magistrate issuing it should be, at the time he issues it, within the local limits of his jurisdiction. He may issue process from a place in a foreign territory.—*Reg.* v. *Locha Kala*, I. L. R., 1 Bom., 340.

All senior officers in the Panjab at head-quarter stations under the Magistrate of the District, who were Magistrates of the first class, were, under s. 157 of Act X of 1872, invested with powers to issue process for persons within the jurisdiction who had committed an offence outside the Magistrate's local jurisdiction.—*Panjab Gazette*, 1873, p. 75.

Procedure where warrant issued by Subordinate Magistrate.

187. If the person has been arrested under a warrant issued under section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate, such Magistrate shall send the person arrested to the District Magistrate to whom he is subordinate, unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person, in which case the person arrested shall be delivered to the Police-officer executing such warrant, or shall be sent to the Magistrate by whom such warrant was issued.

If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under section 186, such Magistrate shall send such person to such Court.

This section corresponds with s. 175 of Act X of 1872.

Liability of British subjects for offences committed out of British India.

188. When an European British subject commits an offence in the dominions of a Prince or State in India in alliance with Her Majesty, or

188. The family of the accused belonged to a village in the Baroda State he was born in the Baroda territory. He entered Govt service. His services were lent by the British Govt. to the State of Cambay. He was charged with taking bribes while serving at Cambay. He was tried and convicted by the 1st class magistrate of Ahmedabad within whose jurisdiction he was found and arrested.
Held that the accused was not a native Indian subject within the meaning of §188 Cr. P. Code and though not a servant of the Queen he was subject to punishment under §4 I.P.C. The magistrate of Ahmedabad in whose jurisdiction he was "found" had no jurisdiction under the section to try him for an offence committed in a foreign State.
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when a Native Indian subject of Her Majesty commits an offence at any place beyond the limits of British India, Ch. XV s. 188

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found:

Provided that no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there be one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India:

Political Agent to certify fitness of inquiry into charge.

Provided also that any proceedings taken against any person under this section, which would be a bar to subsequent proceedings against such person for the same offence, if such offence had been committed in British India, shall be a bar to further proceedings against him under the Foreign Jurisdiction and Extradition Act, 1879, in respect of the same offence in any territory beyond the limits of British India.

This re-enacts s. 9 of the Foreign Jurisdiction and Extradition Act, XXI of 1879, which section has been repealed by this Act.—*Sched. I, infra.*

Act XXI of 1879 extends (*a*) to all European British subjects in the dominion of Princes and States in India in alliance with Her Majesty; (*b*) to all Native Indian subjects of Her Majesty in any place beyond the limits of British India.—*S.* 8. The Act itself contains no definition of 'Native Indian subjects.' Mere owning some land in British India and occasional residence in British India do not themselves constitute a person a Native Indian subject.—*Fakir* v. *Empress*, Panj. Rec., 1885, p. 1. The term "Native subject of Her Majesty" means only Native subjects *de jure*.—*Ibid.*

In the case of *Empress* v. *Maganlal*, I. L. R., 6 Bom., 622, a Native subject of Her Majesty committed an offence (theft in a dwelling-house) in the territory of a Native State in alliance with Her Majesty, and was discovered in the territory of another Native State also in alliance with Her Majesty, and was from there brought down, or came of his own accord, to Ahmedabad. A certificate was granted by the Political Agent, that the offence ought, in his opinion, to be inquired into in British India. At Ahmedabad, a preliminary inquiry was held by a Magistrate, who committed the accused for trial by the Court of Sessions at Ahmedabad. The Bombay High Court held, that the Sessions Court was competent to try the offence committed in foreign territory, as if it had been committed in the Ahmedabad District, under s. 9 of Act XXI of 1879, for, when the accused was brought or came from foreign territory to Ahmedabad, he "was found" at a place in British India within the meaning of the section. The expression "was found" in that section, it was considered, must be taken to mean not where a person is discovered, but where he is actually present. See *Empress* v. *Sarmukh Singh*, I. L. R., 2 All., 218.

The following letter, dated 28th June 1884, from the Secretary of the Government of Bengal, to all Commissioners of Divisions and District Magistrates, is important with reference to extradition between the French and British possessions in India:—I am directed to state, for your information, that the question of extradition between the French and British possessions in India has recently been under the consideration of the Government of India and Her Majesty's Secretary of State for India. The practical question at issue was whether the procedure in cases of extradition should be regulated by the stipulations of Article IX of the Treaty of 7th March 1815 between Great Britain and France, which relates exclusively to the Indian possessions of the two countries, and under which persons accused

Ch. XV s. 188 of non-political offences of a grave character have hitherto been surrendered upon application, supported by a warrant and summary of the charges, no depositions of witnesses being required; or whether it was necessary to observe the more stringent provisions of s. 14 of the Indian Extradition Act, XXI of 1879, and ss. 3 and 10 of Statute 33 and 34 Vic., Cap. 52, relating to extradition. The decision at which Her Majesty's Government has arrived is, that the existing practice is to be maintained, and that the Indian Act of 1879 and the English Statute of 1870 do not apply.

As to arrests of persons other than European British subjects escaping into British India, see s. 18, Chap. IV, of Act XXI of 1879.

The following direction by the Governor-General in Council, dated 22nd May 1885, has been published:—

No. 1637*I.*—In exercise of the powers conferred by ss. 4 and 5 of Act XXI of 1879 (The Foreign Jurisdiction and Extradition Act, 1879), and all other powers enabling him in this behalf, the Governor-General in Council is pleased to direct as follows:

(1.) The Superintendent of the Hyderabad Residency Bazaars for the time being shall exercise, within the limits of the Hyderabad Residency Bazaars, the powers of a District Magistrate as described in the Code of Criminal Procedure.

(2.) The First Assistant to the Resident at Hyderabad for the time being shall exercise, within the limits of the Hyderabad Residency Bazaars, the powers of a Court of Session as described in the Code of Criminal Procedure.

(3.) The Resident at Hyderabad for the time being shall exercise, within the limits of the Hyderabad Residency Bazaars, the powers of a High Court as described in the Code of Criminal Procedure.

(4.) This notification applies to all proceedings except proceedings against European British subjects or persons jointly charged with European British subjects.

(5.) All criminal powers which may, before the date of this notification, have been exercised by the officers referred to herein within the limits specified shall be deemed to have been exercised in accordance with law.

(6.) As much of the Notification of the Government of India in the Foreign Department, No. 29, Judicial, dated the 18th January, 1869, as applies to the Hyderabad Residency Bazaars is hereby cancelled.

No. 1639*I.*—In exercise of the powers conferred by ss. 4 and 5 of Act XXI of 1879 (The Foreign Jurisdiction and Extradition Act, 1879), and of all other powers enabling him in this behalf, the Governor-General in Council is pleased to direct as follows:

(1.) The Superintendent of the Hyderabad Residency Bazaars for the time being shall exercise, within the limits of His Highness the Nizam's Territories (in all cases in which such powers may lawfully be exercised by the Governor-General in Council within such territories), the powers of a District Magistrate as described in the Code of Criminal Procedure.

(2.) The First Assistant to the Resident at Hyderabad for the time being shall exercise, within the limits of His Highness the Nizam's Territories (in all cases in which such powers may lawfully be exercised by the Governor-General in Council within such territories), the powers of a Court of Session as described in the Code of Criminal Procedure.

(3.) The Resident at Hyderabad for the time being shall exercise the powers of a High Court as described in the said Code in respect of all offences over which magisterial jurisdiction is exercised by the Superintendent of the Hyderabad Residency Bazaars within the said territories, and in respect of all offences over which the jurisdiction of a Court of Session is exercised by the First Assistant to the Resident within the said territories.

(4.) In the exercise of the jurisdiction of a Court of Session conferred on him by this notification, the First Assistant to the Resident may take cognizance of any offence as a Court of original criminal jurisdiction without the accused person being committed to him by a Magistrate, and shall, when so taking cogni-

zance of any offence, follow the procedure laid down by the Code of Criminal Procedure for the trial of warrant-cases by Magistrates.

(5.) This notification applies to all proceedings except proceedings against European British subjects or persons jointly charged with European British subjects, and it applies to proceedings which may be pending at the date of this notification if they have been instituted and are being conducted in conformity with the provisions herein contained.

(6.) Nothing in this notification shall be deemed to extend to any cantonment, or to the Hyderabad Residency Bazaars, or to any railway lands situate within the said territories.—*Gazette of India*, 1885, *May 23rd*, *Part I*, p. 304.

The following sections of Act XXI of 1879 are important:—

Arrest and removal of persons other than European British subjects escaping into British India.

11. When an offence has been committed or is supposed to have been committed in any State against the law of such State by a person not being a European British subject, and such person escapes into or is in British India, the Political Agent for such State may issue a warrant for his arrest and delivery at a place and to a person to be named in the warrant—

if such Political Agent thinks that the offence is one which ought to be inquired into in such State;

And if the act said to have been done would, if done in British India, have constituted an offence against any of the sections of the Indian Penal Code mentioned in the Schedule hereto annexed, or under any other section of the said Code, or any other law, which may, from time to time, be specified by the Governor-General in Council by a notification in the Gazette of India.

Direction and execution of warrant.

12. Such warrant may be directed to the Magistrate of any district in which the accused person is believed to be, and shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants; and the accused person, when arrested, shall be forwarded to the place and delivered to the officer named in the warrant.

Political Agent may himself dispose of case, or make over person to ordinary Courts for trial.

13. Such Political Agent may either dispose of the case himself, or, if he is generally or specially directed to do so by the Governor-General in Council, or by the Governor of the Presidency of Fort St. George in Council, or by the Governor of the Presidency of Bombay in Council, may give over the person so forwarded, whether he be a Native Indian subject of Her Majesty or not, to be tried by the ordinary Courts of the State in which the offence was committed.

Requisitions for extradition by the executive of any part of British dominions or Foreign Power.

14. Whenever a requisition is made to the Governor-General in Council or any Local Government by or by the authority of the persons for the time being administering the Executive Government of any part of the dominions of Her Majesty, or the territory of any Foreign Prince or State, that any person accused of having committed an offence in such dominions or territory should be given up, the Governor-General in Council or such Local Government, as the case may be, may issue an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had been committed within the local limits of his jurisdiction, directing him to inquire into the truth of such accusation.

The Magistrate so directed shall issue a summons or warrant for the arrest of such person, according as the offence named appears to be one for which a summons or warrant would ordinarily issue; and shall inquire into the truth of such accusation, and shall report thereon to the Government by which he was directed to hold the said inquiry. If, upon receipt of such report, such Government is of opinion that the accused person ought to be given up to the persons making such requisition, it may issue a warrant for the custody and removal of such accused person and for his delivery at a place and to a person to be named in the warrant.

The provisions of s. 10 shall apply to inquiries held under this section. (See s. 189, *post*, of the Code.)

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15. Whenever any person accused or suspected of having committed an offence out of British India is within the local limits of the jurisdiction of a Magistrate in British India, and it appears to such Magistrate that the Political Agent for any State could, under the provisions of section 11, issue a warrant for the arrest of such person, or that the persons for the time being administering the Executive Government of any part of the dominions of Her Majesty or the territory of any Foreign Prince or State could demand his surrender, such Magistrate may, if he thinks fit, issue a warrant for the arrest of such person, on such information or complaint and such evidence as would, in his opinion, justify the issue of such a warrant if the offence had been committed within the local limits of his jurisdiction.

Magistrate may, in certain cases, issue warrant for arrest of person accused of having committed an offence out of British India.

Any Magistrate issuing a warrant under this section shall, when the offence appears or is alleged to have been committed in a State for which there is a Political Agent, send immediate information of his proceedings to such Agent, and in other cases shall at once report his proceedings to the Local Government.

Magistrate to inform Political Agent or Local Government.

With reference to the provisions of s. 13 of Act XXI of 1879, the Governor-General in Council was pleased to direct that, for offences committed in any of the following States,—*viz.*, Patiala, Jind, Nabha, Maler Kotla, Kalsia, Dujana, Pataudi and Loharu, Bahavalpur, Chamba, Faridkot, Mandi, Suket, Sirmur (Naha), Kahlur (Bilaspur), Bashahr, Nalagarh, Keonthal, Baghal, Baghat, Jubbal, Kumharsain, Bhajji, Mailog, Balsan, Dhami, Kuthar, Kunhiar, Mangal, Bija, Darkuti, Taroch, Sangri, the persons accused shall be handed over by the Political Agent concerned to the Courts of the State for trial. But this direction was subject to the instructions contained in the notifications published in the *Gazette of India* No. 87J., dated the 16th August 1876, and to the further condition that, should there be, in any particular instance, special reasons for his so doing, the Political Agent might dispose of the case himself. Letter dated Simla, 13th August 1885, Foreign Secretary to Government of Panjab.—*Panjab Rec.*, *Circular Or.*, p. 28.

189. Whenever any such offence as is referred to in section 188 is being inquired into or tried, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a judicial officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

Power to direct copies of depositions and exhibits to be received in evidence.

This re-enacts s. 10 of the Foreign Jurisdiction and Extradition Act, XXI of 1879, which section is repealed by this Act.—*Sched. I, infra.*

'Political Agent' defined.

190. In sections 188 and 189 the expression 'Political Agent' means and includes—

(*a*) the principal officer representing the British Indian Government in any territory beyond the limits of British India;

(*b*) any officer in British India appointed by the Governor General in Council, or the Governor in Council of the Presidency of Fort St. George or Bombay, to exercise all or any of

the powers of a Political Agent under the Foreign Jurisdiction and Extradition Act, 1879, for any territory not forming part of British India. Ch. XV s. 191

This section repeats the definition of 'Political Agent' to be found in s. 3 of the Foreign Jurisdiction and Extradition Act, XXI of 1879.

B.—Conditions requisite for Initiation of Proceedings.

Cognizance of offences by Magistrates.

191. Except as hereinafter provided, any Presidency Magistrate, District Magistrate, Subdivisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence— amended act 12 of

(*a*) upon receiving a complaint of facts which constitute such offence;

(*b*) upon a police report of such fact;

(*c*) upon information received from any person other than a Police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

The Local Government, or the District Magistrate, subject to the general or special orders of the Local Government, may empower any Magistrate to take cognizance under clause (*a*) or clause (*b*) of offences for which he may try or commit for trial.

The Local Government may empower any Magistrate of the first or second class to take cognizance under clause (*c*) of offences for which he may try or commit for trial.

[" When a Magistrate takes cognizance of an offence under clause (*c*), the accused, or when there are several persons accused, any one of them shall be entitled to require that the case shall, instead of being tried by such Magistrate, be either transferred to another Magistrate or committed to the Court of Session."—Act III of 1884, s. 2.]

See Act X of 1872, ss. 23, 25, 27, and 140, cls. (*a*), (*b*), (*c*), and (*d*); s. 141, para. 1; s. 142, para. 1; and Act IV of 1877, ss. 25, 28, and 46, the provisions of which are embodied in this section. The clause added by Act III of 1884 is important.

The provision in cl. (*b*) of s. 140 of Act X of 1872, that a police information or report should be regarded as a complaint in non-cognizable cases, has been omitted in this section. The sentence in cl. (*c*) of the same section that "any person acquainted with the facts of a case may make a complaint" has also been omitted.

By s. 37, *supra:* In addition to his ordinary powers, any Subdivisional Magistrate, any Magistrate of the first, second, or third class, may be invested by the Local Government or the District Magistrate, as the case may be, with any powers specified in the fourth schedule as powers with which he may be invested by the Local Government or the District Magistrate.

"Complaint" means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code; that some person, whether known or unknown, has committed an offence, but does not include the report of a Police-officer.—*S.* 4 (*a*), *supra*. See note to s. 195, *post.*

Ch. XV s. 191 If any Magistrate, not empowered by law, erroneously, in good faith, takes cognizance of an offence under cl. (*a*) or (*b*) of this section, his proceedings shall not be set aside merely on the ground of his not being so empowered.—*Ss.* 529 (*e*) and 530, *infra.*

In case of contempts of lawful authority, complaint may be made by the public servant concerned, or by some public servant to whom he is subordinate.—*S.* 195, *post.* In case of certain offences against public justice committed in any Court, and in case of certain offences relating to documents given in evidence in any Court, complaint may be made by such Court or by some other Court to which such Court is subordinate.—*Ibid.*

Under s. 196, a Court cannot take cognizance of certain offences against the State or punishable under s. 294A (as to keeping of lotteries) of the Penal Code, except on complaint made by, or order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in that behalf.

Offences under Chaps. XIX (criminal breach of contracts of service), or XXI (of defamation), or ss. 493—496 of the Penal Code can only be dealt with on complaint by some person aggrieved (s. 198, *post*); and offences under ss. 497, 498 (adultery, etc.) can only be dealt with upon complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman on his behalf at the time when the offence was committed (s. 199, *post*).

Police Report, see. s. 173, *supra.*

All senior officers at head-quarter stations under the Magistrate of the District in the Panjab, who were Magistrates of the first class, were, under s. 142 of Act X of 1872, invested with "power to entertain cases without complaint" when the Magistrate of the District was absent from head-quarters.—*Panjab Gazette*, 1873, p. 75.

In that province, also, Magistrates of the first class have power, subject to the general control of the Magistrate of the District, to entertain cases without complaint. —*Panjab Gazette*, 1878, *Part I*, p. 361.

Clause (*c*) of this section would apply only to cases in which the private individual injured or aggrieved does not come forward to make a formal complaint, being intended for the purpose of enabling a Magistrate to take care that justice may be vindicated notwithstanding that the persons aggrieved are unwilling or unable to prosecute. See *In the matter of Surendra Nath Roy*, 5 B. L. R., 274 ; (S. C.) 13 W. R., Cr., 27. Where sanction had been given by a Deputy Magistrate to prosecute a person for bringing a false charge, and such sanction was not proceeded with, it was held, under s. 142 of Act X of 1872, that it was open to the District Magistrate under that section to take up the case without a complaint.—*Empress* v. *Nipcha*, I. L. R., 4 Calc., 712. See also *Queen* v. *Doorga Nath Roy*, 8 W. R., Cr., 9.

An accused person having been discharged under s. 215 of the Code of 1872, the District Magistrate, after calling for the proceedings, considered that the discharge had been improper, and, professing to act under s. 142 of the same Code (corresponding with this section), referred the matter for retrial by another Magistrate. The accused was convicted, but the conviction was annulled by the High Court.—*Empress* v. *Gowdapa bin Venkugowda*, I. L. R., 2 Bom., 534. But see *In re Ramjai Mazumdar*, 6 B. L. R., Appx., 67 ; (S. C.) 14 W. R., Cr., 65 ; *Queen* v. *Tilkoo Goalu*, 8 W. R., Cr., 61.

"*Knowledge or suspicion.*"—It is at least doubtful whether a Magistrate, who is of opinion that a person has been improperly discharged by a Magistrate subordinate to him, may not, under this section, take cognizance of the offence which he may consider or suspect to have been committed. See *In re Mohesh Mistre*, I. L. R., 1 Calc., 282, where the High Court of Calcutta expressed their dissent from the case of *Sydya bin Satya*, quoted in Prinsep's Criminal Procedure Code, 5th Edition, p. 269. See also Chap. XXXII, *infra.* Under this section, as now altered by Act III of 1884, the accused would be entitled to require the case to be transferred to another Magistrate or committed to the Court of Session.

Belief founded on private or anonymous information is not 'knowledge' within the meaning of this section.—*In re Mohesh Chunder Banerjee*, 4 B. L. R., Appx., 1.

A Magistrate taking a complaint and issuing a summons thereon, acts not ministerially but judicially.—*Reg.* v. *Sadashivappa Pandurangappa*, 5 Bom. H. C. R., Cr., 29.

S.192. This section does not authorize a District Magistrate to transfer trial to a subordinate Magistrate cases which are not within the powers of that Magistrate to try either under S.28 of the Code or under some special or local law.

Raghu Singh v. Abdul Wahed.

I.L.R. 23 Cal 442.

Special jurisdiction — section 192 does not authorize the transfer of a case to which sections 20 to 23 of the Cattle Trespass Act apply. Shama v. Kachu Sheikh

I.L.R 23 Cal 300.

It is competent to a Magistrate to receive and take action on petitions relating to criminal charges when transmitted to him by post. Whether a Magistrate should do so or not is, in each particular case, a matter within the Magistrate's discretion.—*Mad. H. C. Pro.*, *20th September* 1879, *Weir*, p. 25. Ch. XV s. 192

192. Any District Magistrate or Subdivisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial to any Magistrate subordinate to him.

Transfer of cases by Magistrates.

Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case, to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial; and such Magistrate may dispose of the case accordingly.

Compare s. 44, para. 1, and s. 141, paras. 2 and 3, of Act X of 1872, and s. 6 of Act XI of 1874.

Under s. 17, *supra*, p. 16, all Magistrates appointed under ss. 8, 12, 13, and 14, and all Benches of Magistrates constituted under s. 15, are subordinate to the District Magistrate : and every Magistrate (other than a Subdivisional Magistrate) and every Bench exercising powers in a subdivision is subordinate to the Subdivisional Magistrate, subject, however, to the control of the District Magistrate.

If any Magistrate, not empowered by law, erroneously, in good faith, tranfers a case under this section, his proceedings will not be set aside merely on the ground of his not being so empowered.—*S.* 529 (*f*), *infra*.

'Inquiry' does not mean 'preliminary inquiry.'—*Proceedings*, *23rd March*, 1869; 4 *Mad. H. C. R.*, *Appx.*, *xl.*

Notice of any transfer ought to be given to the parties. See *Omrao Singh* v. *Fakir Chand*, I. L. R., 3 All., 749; *Teacotta Shekdar* v. *Ameer Majee*, 10 C. L. R., 239; (S. C.) I. L. R., 8 Calc., 393.

This section confers no authority on one Subordinate Magistrate to refer to another Subordinate Magistrate a case referred to him for disposal.—*Mad. H. C. Pro.*, *15th June* 1874, *Weir*, p. 32; (*S. C.*) 7 *Mad. H. C. R.*, *Appx.*, *xxxiii.*

The Magistrate should state reasons of his own for the reference, and not merely send up the reasons which may have been left by his predecessor.—*Batool Nushyo* v. *Bhugloo Chowkeedar*, 10 W. R., Cr., 50. See *Ramzan Ali* v. *Durpo Komilla*, 24 W. R., Cr., 58.

When once a case has been made over by a Magistrate to the Deputy Magistrate for trial, the jurisdiction of the Magistrate to do anything more in the matter has ceased, so long as the transfer to the Deputy Magistrate is in existence. A Magistrate who has made a transfer and wishes to take further steps in the matter, must formally withdraw the case from the hands of the Deputy Magistrate.—*Shanto Teorni* v. *Belilios*, 3 B. L. R., Appx., 151. See s. 528, *infra*.

Section 528, *infra*, provides, that any District Magistrate or Subdivisional Magistrate may withdraw any case from, or recall any case which he had made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

In Bengal, powers under s. 44 of Act X of 1872 were only conferred on special applications for special reasons shown. In a Resolution, dated the 1st January 1873, the reasons were thus stated: "The Lieutenant-Governor has deliberately not given power, under s. 44, of transferring cases taken up on complaint, because he thinks there has been hitherto far too great disposition to hand parties about from one officer to another. No doubt, it is well that complaints should be looked into by competent officers before they are entertained; but, on the other hand, His Honour is much inclined to think that when all the petitions are taken by one officer, he does not sift them properly, and it seems to him that when

Ch. XV s. 193 a complaint is taken by one officer and handed over to another and another, the responsibility for due sifting in the first instance is lost, and cannot be fixed. For the present, then, he thinks it is better that Magistrates of districts should exercise the power of determining what classes of cases each officer may hear within certain local limits, and let these officers take the petitions themselves. Under the distribution of work above suggested, it would be most desirable that the proposition several times made should be carried out,—namely, that at large stations, one Court should sit regularly as the Police Court, and take up at once ordinary police cases there sent in by the police."—*Calcutta Gazette*, 1873, p. 63.

All Magistrates of the first class in the Panjab and Madras have power to make over cases taken upon complaint, &c., to a Subordinate Magistrate.—*Panjab Gazette*, 1879, *Part I*, p. 680; *Madras Gazette*, 1873, p. 717.

Complaints referred by Subordinate Magistrates under this section and the above notification must always be sent by post or by a messenger of the Court, after being endorsed with the date of presentation and an order of reference specifying the number of days within which the complainant must appear to prosecute; and at the same time a memorandum must be given to the person presenting the complaint, informing him to what Magistrate his complaint has been referred, and of the time within which he must appear before such Magistrate to prosecute.—*Panjab Gazette*, 1879, *Part III*, p. 527.

Cognizance of offences by Courts of Session.

193. Except as otherwise expressly provided by this Code, or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction, unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

Cases to be tried by Additional and Joint Sessions Judges;

Additional Sessions Judges and Joint Sessions Judges shall try such cases only as the Local Government by general or special order directs them to try, or as the Sessions Judge of the Division makes over to them for trial.

by Assistant Sessions Judges.

Assistant Sessions Judges shall try such cases only as the Sessions Judge of the Division by general or special order makes over to them for trial.

The first paragraph corresponds with s. 231 of Act X of 1872 as amended by s. 18 of Act XI of 1874. Provisions similar to those in the second and third paragraphs were contained in ss. 17 and 18 of the former Act.

The object of restricting a Sessions Court from taking cognizance of any offence (except as specially provided, *e. g.*, by ss. 480, 481, 477, and 478), unless the accused has been committed by a Magistrate, is to secure to the prisoner a preliminary inquiry which affords him an opportunity of becoming acquainted with the circumstances of the offence imputed to him, and enables him to make his defence.—*Mutirakal* v. *Queen*, I. L. R., 3 Mad., 351.

Section 351, *post*, provides that "any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of examination for any offence of which such Court can take cognizance, and which, from the evidence, he may appear to have committed; and may be proceeded against as though he had been arrested or summoned. When the detention takes place in the course of an inquiry under Chap. XVIII, or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard."

That section would apparently empower a Court of Session to proceed against any person appearing to be an offender attending the Court. This section (193) provides that, "except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as

a Court of original jurisdiction, unless the accused has been committed to it by a Magistrate duly empowered in that behalf." The corresponding section (231) of Act X of 1872 did not contain any saving-clause, and Courts of Sessions could not, therefore, proceed under s. 104 of that Act (corresponding with s. 351 of the present Code). Ch. XV s. 193

The fact of a commitment being made is sufficient to enable the Sessions Judge to proceed with the trial. It lies on the party impugning the correctness of the proceedings to show that there was no jurisdiction.—*Reg.* v. *Komurooddee Sikhdar*, 13 W. R., Cr., 17; *Reg.* v. *Ranchoddas Nathubhai*, 4 Bom. H. C. R., Cr., 35. See Evidence Act, s. 114, cl. (*e*).

By s. 532, *infra*, if any Magistrate or other authority purporting to exercise powers duly conferred, but not being so conferred, commits an accused person to take his trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been prejudiced, unless objection was made on behalf either of the accused or of the prosecution, to the jurisdiction of such Magistrate or other authority, during the inquiry and before the order of commitment. If such Court considers that the accused may be prejudiced, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

Applications under Chap. XXXII (of reference and revision) cannot be referred to a Joint Sessions Judge under this section, so as to make it competent to a Joint Sessions Judge to dispose of them, a Joint Sessions Judge being strictly precluded from exercising any of the powers under Chap. XXXII, and the second clause of this section contemplating only cases for trial.—*Reference by Sessions Judge of Surat*, I. L. R., 9 Bom., 352 See *In re Musa Asmal*, I. L. R., 9 Bom., 164.

Absence of commitment is a defect in substance and not of form, and is therefore not covered by s. 537, *post.*—*Sharma* v. *Empress*, Panjab Rec., 1884, p. 92.

Under s. 477, *infra*, a Sessions Court may charge a person for any offence referred to in s. 195, *infra*, and committed before it, or brought under its notice in the course of a judicial proceeding, and may commit or admit to bail and try such person upon its own charge. Under s. 478, Civil and Revenue Courts have powers to complete investigations into offences committed before them or brought to their notice in the course of a judicial proceeding, and to commit to the High Court or Sessions Court.

Sections 480 and 485, *infra*, further empower the Sessions Court to deal with certain cases of contempt, and to imprison a witness refusing to answer questions or to produce documents in his possession or power.

Section 206, *infra*, provides that any Presidency Magistrate, District Magistrate, Subdivisional Magistrate, Magistrate of the first class, or any Magistrate empowered in that behalf by the Local Government, may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

Section 226, *infra*, provides that where any person is committed for trial without a charge or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules in this Code as to the form of charges.

See Chap. XXXIII as to criminal proceedings against Europeans and Americans.

As to offences which a Sessions Court may try, see s. 28, *supra*, p. 20.

In Bombay, the following rules are in force:—The Criminal Sessions shall commence in all Sessions Divisions on the first day in each month, except in cases where some other special provision shall have been made by the High Court. Whenever the day fixed for the commencement of the Criminal Sessions shall be a close holiday, the Sessions shall begin on the next Court-day. Sessions Judges should give notice to Magistrates up to what time they will receive cases and prisoners for trial at each Session.—*Bombay Gazette*, 1879, pp. 471, 475.

In Bengal, the following instructions as to fixing Sessions have been issued:—

(*a*.) In the first week in December in each year the Sessions Judge shall fix the number of sessions to be held during the year following, and the dates on which respectively they are to begin, the number varying with the estimated or average number of trials, and not being less than six or more than ten in each year, except

Ch. XV s. 193 in outlying districts, where ordinarily the number should not be less than four. The arrangements made are to be immediately reported to the High Court for approval, but may be carried out, unless the disapproval of the Court be communicated.

(*b.*) The Magistrate of each district shall obtain from all the Subordinate Magistrates, who exercise the power of committing to the Sessions, the particulars of all cases committed by them, and shall prepare and submit to the Sessions Judge two days before the commencement of each session a calendar of all such cases in the following form. This calendar shall be the basis of the Sessions Judge's return to the High Court.

(*Form of District Magistrate's Calendar.*)

Calendar of Accused Persons for trial before the Court of Session.

Session of 18 .

Number of case.	Committing officer.	Number and name of accused.	Charges, and under what law.	Date of offence.	Date of apprehension or appearance to summons.	Date of commitment.	In jail or on bail.	Finding and sentence or other order of the Court of Session as regards each prisoner.
1	2	3	4	5	6	7	8	9

—*Calc. H. C. C. O., No.* 5 *of* 14*th October* 1879, *Wilkins*, p. 23.

As to commitment and trial of sessions cases, see the rules in force in the Panjab.—*Smyth*, pp. 93—100.

The following circular orders were issued to Sessions Judges, Joint Sessions Judges, and District Magistrates in the Presidency of Bombay:—

I am directed to inform you that, after further correspondence with Government, and with a view to prevent the unnecessary detention from their homes of witnesses in sessions cases, the Hon'ble the Chief Justice and Judges have been pleased to direct that the rules embodied in the High Court's letter, No. 953 of the 7th July 1880, should be permanently observed in regard to cases committed for trial during the monsoon months of this or future years.

2. With regard to cases committed during the fair season, their Lordships direct that the practice of holding fixed sessions at the prescribed times shall be adhered to, but that the Sessions Judge may, at his discretion, hold a special sessions (reporting the same to the High Court) for the trial of any case in which he may be of opinion, after consultation with the committing Magistrate, that an early trial is desirable and may be held without prejudice to the accused person.

3. Their Lordships further desire, that whenever, in cases not provided for in para. 2 of Circular No. 953 of 1880, a committing Magistrate is in telegraphic communication with the Sessions Judge, or is otherwise able to obtain a reply from him within twenty-four hours from the time when a case is ready for commitment, he shall obtain from the Sessions Judge an order fixing the trial for a particular day of the sessions, and shall make the committal accordingly; and when the committing Magistrate is too distant for such speedy communication with the Sessions Judge, he shall commit for the first day of the sessions, unless the Sessions Judge shall by general order intimate his readiness to receive cases up to a later date. It is further directed, whenever a Magistrate commits more than one case for the same sessions, he shall, in the absence of any special days having been fixed for their trial, commit them at intervals of two days apart,—*e.g.*, the first case for the first day, the second for the third day, the third for the fifth day, and so on:—*Bombay H. C. C. O., No.* 569 *of* 1881

In compliance with the wishes of His Excellency the Governor in Council, the Hon'ble the Chief Justice and Judges are pleased to direct that a further experiment be made during this monsoon of holding frequent sessions until the end of October.

2. When a Magistrate, who is at or near the Huzur, commits a case for trial, he should forthwith send the record and proceedings with note of the additional witnesses, if any, required by the accused to the Sessions Judge or Joint Sessions Judge, who will be responsible for fixing without delay the earliest date on which the case should be tried with due but comparative regard to the convenience of persons concerned in other cases, criminal or, civil, before the Court, This date should be communicated to the Magistrate in order that the witnesses may be bound over to appear.

3. When fixing the date for trial, the Judge should take into consideration the circumstances of the case. After looking at the papers, he should estimate how long the trial is likely to last. Sometimes, when witnesses are numerous and have come from a distance, it will be right for him to displace other business in order that a criminal case may be heard immediately, but this will not always be the case. The convenience of witnesses may sometimes be best consulted by giving them time to go back to their homes, if not very distant, before the trial comes on.

4. When the committing Magistrate is not near the Huzur, he should commit the case for trial at a sessions to begin on the first Monday of the month according to the usual practice, giving the Sessions Judge or Joint Sessions Judge immediate notice.

5. To obviate the delay which would arise from a reference of cases by the Sessions Judge of Belgaum to the Joint Sessions Judge at Kaladgi, the Government will be requested to issue a notification under s. 17 of the Criminal Procedure Code, directing the Joint Sessions Judge to try all cases which may be committed to him by Magistrates in the Kaladgi portion of the Belgaum Sessions Division during the months of July, August, September, and October; and during these months the said Magistrates should make committals to the Joint Sessions Judge.

6. His Excellency the Governor in Council will also be requested to invest the District Magistrate of Kolaba with the powers of a Joint Sessions Judge, and to direct him to try all cases that may be committed to him for trial by the Magistrates in the Kolaba portion of the Thana Sessions Division during the months of July, August, September, and October; and during these months the said Magistrates should make committals to the Joint Sessions Judge.

7. As regards cases committed for trial by Magistrates in the Broach, Kaira, Nasik, and Sholapur portions of the Surat, Ahmedabad, Thana, and Poona Sessions Divisions, respectively, such cases should be committed for trial at Surat, Ahmedabad, Thana, and Poona, respectively, till the end of October. Magistrates at or near the stations of Broach, Kaira, Nasik, and Sholapur should act under the rules laid down in paras. 2 and 3 of this order.—*Bombay H. C. C. O., No.* 953 *of* 1880.

Cognizance of offences by High Court.

194. The High Court may take cognizance of any offence upon a commitment made to it in manner hereinafter provided.

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the Twenty-fourth and Twenty-fifth of Victoria, chapter 104.

See s. 145 of Act X of 1872.

See ss. 22—29 of the Letters Patent for Bengal, Madras, and Bombay respectively; ss. 15—22 of the Letters Patent for the North-Western Provinces.

Statute 24 and 25 Vict., c. 104, is the Charter Act, 1865.

The whole of Act X of 1875 (the High Courts' Criminal Procedure Act) has been repealed by the present Code, with the exception of s. 144, and so much of s. 146 as relates to informations. These sections, which are important, are as follows:—

144. The Advocate-General may, with the previous sanction of the Governor-General in Council or the Local Government, exhibit to the local High Court, against persons subject to the jurisdiction of the said Court, informations for all

Ch. XV s. 195 purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the Court of Queen's Bench or Exchequer.

Such proceedings may be taken upon every such information as may lawfully be taken in case of similar informations filed by Her Majesty's Attorney-General in England, so far as the circumstances of the case and the course and practice of proceeding in the said High Courts respectively will admit.

All fines, penalties, forfeitures, debts, and sums of money recovered or levied under or by virtue of any such information shall belong to the Government of India.

146. At any stage of any proceeding under this Act, before the return of the verdict, the Advocate-General may, if he think fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the information or charge; and thereupon all proceedings on such information or charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal.

195. No Court shall take cognizance—

Prosecution for contempts of lawful authority of public servants.

(*a*) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, except with the previous sanction, or on the complaint, of the public servant concerned, or of some public servant to whom he is subordinate;

Prosecution for certain offences against public justice.

(*b*) of any offence punishable under sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, or 228 of the same Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate;

Prosecution for certain offences relating to documents given in evidence.

(*c*) of any offence described in section 463, or punishable under sections 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate.

Nature of sanction necessary.

The sanction referred to in this section may be expressed in general terms, and need not name the accused person; but it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed.

When sanction is given in respect of any offence referred to in this section, the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts.

195. during the pendency of the civil litigation unless it could be shown that the accused will abscond and so will not be forthcoming before the magistrate.
In Re Shrikhanda Maharaj I.L.R 16 Bom 729.

Appeal No appeal lies from orders passed under § 195 of the Cr. P. Code. The order granting or refusing to grant sanction to prosecute may be retained in revision and not by way of appeal.
Mehdi Hasan v. Tota Ram I.L.R 15 All 61.

Registrar Court — A Registrar acting under section 73 of the Indian Registration Act 1877 is not a Court within the meaning of section 195 of the Code of Criminal Procedure
I.L.R 15 All 141. (I.L.R 15 Mad 138 dissent.)

Where a Deputy Commissioner issued a sanction to prosecute the accused upon an express application made on behalf of a certain person against whom a charge of [illegible] had been made, and which he found to be false, h[eld], taking the order to have been one made under section 195 of the Code of Criminal Procedure that it was a proper sanction in as much as it was given to a contemplated prosecution by a definite person.
Baperam Surma v. Gourinath Dutt.
I.L.R 20 C. 474

A sanction [illegible] litigation of the [illegible]
[illegible]
[illegible]

Imp Object of [illegible] [illegible] is not [illegible] the object of the [illegible] to prosecute is [illegible] private spite and [illegible] when the interest of [illegible] necessary. It is not intended [illegible] to allow any person as of right to attack his civil adversary in a criminal court.
Before sanctioning a prosecution the judge should be satisfied not only that in his judgment the document is not genuine but that in all probability a conviction will be the result.
Ram Dhoo v. Soona Ra[illegible] C.W.N Vol 1 L 400.

appeal - The valuation of the civil suit in the course of which the offence for which sanction is granted is committed is immaterial to the question of the court to which revocation of the sanction will lie.
Ganga Dei v. Sher Singh
ILR 17 All 51

Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and no such sanction shall remain in force for more than six months from the date on which it was given. Ch. XV s. 195

For the purposes of this section, every Court other than a Court of Small Causes shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie.

The Courts of Small Causes in the Presidency-towns shall be deemed to be subordinate to the High Court, and every other Court of Small Causes shall be deemed to be subordinate to the Court of Session for the Sessions Division within which such Court is situate.

Clause (*a*) of this section corresponds substantially with s. 467 of Act X of 1872. Compare Act X of 1875, s. 133, and Act IV of 1877, ss. 40 and 46.

Under the former Acts it was provided that 'no complaint' of any offence mentioned in the corresponding section should be entertained except with the sanction therein provided. Under this section it is provided that no Court shall 'take cognizance' of any of the offences referred to except as provided.

Under. s. 537, no finding, sentence, or order can be reversed or altered in appeal or revision on the ground that sanction required by this section has not been given, unless there has been a failure of justice. See *In re Kally Mohun Mookerjee*, 13 C. L. R., 47. Objections to a Court's jurisdiction on the ground of want of sanction should be taken at the trial.—*Proceedings*, 7 *Mad. H. C. R.*, 58, *Weir*, p. 20.

Sections 172 to 188 (inclusive) of the Indian Penal Code deal with contempts of the lawful authority of public servants.

There is a sufficient compliance with the provisions of cl. (*a*) when the prosecution is instituted by an inferior ministerial officer under the sanction or the authority of his official superior.—*Reg.* v. *Ram Golam Sing*, 11 W. R., Cr., 22; *Dukhoo Pein* v. *Chundro Kant Chowdry*, 3 W. R., Cr., 68.

Clause (*b*) of this section corresponds with s. 468 of Act X of 1872 and s. 41 of Act IV of 1877. The sections of the Penal Code referred to in this clause are contained in Chap. XI, which deals with 'false evidence and offences against public justice.'

Object of sanction.—The object of the sanction required by this section is to ensure that the prosecution should be instituted after due consideration on the part of the Court before whom the evidence was given, or on the part of a Court to which such Court is subordinate.—*Reg.* v. *Mahomed Hossein*, 16 W. R., Cr., 37. The finding, sentence, or order, however, as already stated, of a Court of competent jurisdiction will not be reversed or altered on appeal or revision on account of the want of sanction required by this section.—*S. 537, infra.*

The Courts which have jurisdiction to grant a sanction to proceedings, it was held, under s. 468 of Act X of 1872, are the Court before which the offence was alleged to have been committed and the Courts to which such Court is subordinate.—*In re Kasi Chunder Mozumdar*, I. L. R., 6 Calc., 440; (S. C.) 7 C. L. R., 330. But, in cases of alleged perjury, an application for sanction to institute a prosecution on a charge of perjury should, as a general rule, be first made to the Court before which the perjury is alleged to have been committed.—*In re Rajah of Venkatageri*, 6 Mad. H. C. R., 92; see *Weir*, p. 28.

A prosecution of a charge under s. 211 of the Indian Penal Code should not be sanctioned as a matter of course, but only when the complainant can satisfy the Court that the interests of justice require a prosecution, and there is a strong *primâ facie* case against the accused.—*In re Gawri Sahai*, I. L. R., 6 All., 114, *per* OLDFIELD, J.

Ch. XV s. 195 Although, before granting sanction to prosecute, a Court is bound to satisfy itself that an offence has been committed, it is not bound to hold an inquiry as to all the persons who may be implicated in such offence.—*In re Govindan Nayan and other Petitioners*, I. L. R., 7 Mad., 224. See 9 W. R., Cr., 3. In the Madras case there was a charge of wrongful confinement and extortion made by J against certain persons. The Magistrate held an inquiry, and having arrived at the conclusion that the charge was false, recorded proceedings to the effect that "the complainant should be prosecuted for false complaint and the individuals mentioned in the police report (the petitioners) should be prosecuted for abetment of the false complaint." There was no evidence in the record to show that the petitioners had any connection with the charge brought by J, though there were certain loose statements against them in the police report. HUTCHINS, J., said:—"Before granting a sanction under s. 195 of the Code of Criminal Procedure, a Court is bound to satisfy itself that an offence has been committed. I do not see that it is bound to hold an inquiry as to all the persons who may be implicated in such offence. On the contrary, the section expressly provides that the sanction may be in general terms, and need not name the accused person or persons at all. That being so, it would seem that the petitioners might have been included in the prosecution, even if they were not named in the order or sanction."

Where an offence of the nature specified in this section is committed before a Court, the Court must in every case hold an investigation to see if there is a *primâ facie* case. It may, after this, send the cases to a Magistrate for regular 'preliminary inquiry.' But if it proceeds under s. 476 to commit direct to the Court of Session, where it has power to do so, it must itself hold a complete inquiry, framing charges and taking depositions. See *Reg.* v. *Radha Nauth Mozoomdar*, 5 Wym. Cr. Rul., 19.

Section 476 is as follows:—When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in s 195, and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient security for his appearance before such Magistrate; and may bind over any person to appear and give evidence on such inquiry or trial. Such Magistrate shall thereupon proceed according to law, and may, if he is authorized under s. 192 to transfer cases, transfer the inquiry or trial to some other competent Magistrate.

The object of the preliminary inquiry is, that the Court may be satisfied that a specific charge coming under the sections mentioned in it ought to be preferred against the accused, and after being so satisfied, it must either commit the case (see s. 487, *infra*), or send it to the Magistrate for inquiry whether a committal should be made or not. See *Kali Prosunno Bagchee, Petitioner*, 23 W. R., Cr., 39. See also *Bhokteram* v. *Heera Kolita*, I. L. R., 5 Calc., 184, *per* AINSLIE, J., p. 187.

It is unnecessary that the preliminary inquiry contemplated by s. 476 should be conducted in the presence of the accused. All the Court making the inquiry has to do is to satisfy itself that there are *primâ facie* grounds for sending the case for investigation to a Magistrate.—9 W. R., Cr., 3.

Powers similar to those conferred on Civil and Criminal Courts alike by this section are conferred on Civil Courts by s. 643 of the Code of Civil Procedure (corresponding with ss. 16 and 19 of the repealed Act, XXIII of 1861). But neither that section nor the sections of the Act for which it was substituted direct the Court to hold any preliminary inquiry before sending a case under the section to a Magistrate for investigation. All that is required is that Court shall be satisfied that there is sufficient ground for sending the case for investigation to the Magistrate. In the case of *Reg.* v. *Baijoo Lall*, I. L. R., 1 Calc., 450, MACPHERSON and MORRIS, JJ., quashed an order made, according to the return of the Judge who made it, under s. 16 of the repealed Act mentioned, without a preliminary inquiry having been made, on the ground that the law as to procedure in cases within that section was embodied in s. 471 of the Criminal Procedure Code of 1872 (476 of this Code), under which a preliminary inquiry was necessary. From the judgment it would appear, however, that the learned Judges treated the order as really made under the section of the Criminal Procedure Code. See *Umbica Sundari Chowdhrani* v. *Ajitoollah Mondul*, 8 C. L. R., 148.

clause (C). Certain documents having been put into Court but not given in evidence. The Court made an order for the prosecution of parties who so put them in on the ground that the documents were forgeries. Held that it is not competent to the Court to go beyond the record.
Zemindar of Sivagiri v. The Queen followed (I.L.R. 6 mad p. 29.)
Abdul Khadar and others vs. Mera Saheb.
I.L.R 15 mad p 224

It is the Court before which, not the Judge before whom, the offence is alleged to have been committed that is to give the sanction. A change of incumbent does not alter the constitution of the Court.—*H. C. Pro., 12th November* 1872, *Weir*, p. 29.

When sanction is given to prosecute a person for a particular offence, the Magistrate may not, without a fresh sanction, frame a charge against the prisoner of having committed some other offence referred to in the section.—*Rajcoomar* v. *Kirthu Ojha*, 13 W. R., Cr., 67. See s. 230, *post.*

Where a complaint has been made before a Magistrate, sanction for a prosecution under s. 211 of the Indian Penal Code without examining all the witnesses whom the person accused of making the false charge wishes to produce in Court, it was held under the Code of 1872, is illegal.—*In re Biyogi Bhagut*, 4 C. L. R., 134; *In re Russick Lall Mullick*, 7 C. L. R., 382; *Empress* v. *Karimdad*, I.L. R., 6 Calc., 496; (S. C.) 7 C. L. R., 467; *Empress* v. *Radha Kishan*, I. L. R., 5 All., 36; *In re Sakhina Bibi*, 8 C. L. R., 387; (S. C.) I. L. R., 7 Calc, 87; *In re Chukradar Potti*, 8 C. L. R., 289; *Empress* v. *Shibo Behara*, I. L. R., 6 Calc., 584; (S.C.) 8 C. L. R., 265. See *In re Gyan Chunder Roy* v. *Protap Chunder Dass*, I. L. R., 7 Calc., 208; (S.C.) 8 C. L. R., 267; and *Syed Nissar Hossain* v. *Ramgolam Singh*, 25 W. R., Cr., 10. But see *In re Bhawani Prosad*, I. L. R., 4 All., 182.

Now s. 253 provides in warrant-cases that if, upon taking all the evidence referred to in s. 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him; but that nothing in the section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

The proviso to that section is new, and it may be that, under the present Code, when a Magistrate considers a charge groundless, and discharges the accused without taking all the evidence offered by the complainant, a prosecution would lie under s. 211 of the Indian Penal Code. It would seem, however, that in such a case it would be necessary to hold a preliminary inquiry under s. 476. See *post*, *Empress* v. *Bhawani Prosad*, I. L. R., 4 All., 102, and cases there cited. See notes to ss. 200, 203, 253, and 476, *post.*

Where no complaint is made before a Magistrate, but a charge is laid before the police, and that charge is found to be false, it is not necessary, before a prosecution can be instituted under s. 211 of the Penal Code, to obtain the sanction of a Court.—*Government of Bengal* v. *Gokool Chunder Chowdhry*, 24 W. R., Cr., 41; *Ram Runpur Bhandari* v. *Madhub Ghose*, 25 W. R., Cr., 33; *Queen* v. *Gour Mohun Singh*, 16 W. R., Cr., 44; *Empress* v. *Irad Ally*, I. L. R., 4 Calc., 869; (S.C.) *nom. Nusibunnissa Bibi* v. *Sheikh Erad Ali*, 4 C. L. R., 413; *Empress* v. *Abdul Hasan*, I. L. R, 1 All., 497; *Empress* v. *Salik Roy*, I. L. R., 6 Calc., 582; (S.C.) 8 C. L. R., 255. See *Asrof Ali* v. *Empress*, I. L. R., 5 Calc, 281.

Where a case was referred by the Magistrate to the police for inquiry, the police reported it false, and the Magistrate thereupon, under s. 195, directed a prosecution under s. 211 of the Penal Code for making a false charge. It was there held, that sanction ought not to have been granted until the complainants had been afforded an opportunity of proving their case.—*Empress* v. *Ganga Ram*, I. L. R., 8 All., 38. See *Empress* v. *Karimdad*, I. L. R., 6 Calc., 496.

Clause (*c*) corresponds with s. 469 of Act X of 1872 and s. 42 of Act IV of 1877.

Section 469 of Act X of 1872, it was held, referred, in cases of forgery, only to cases in which a supposed forged document had been put in evidence in some proceedings in a Civil or Criminal Court. In other cases of forgery, the Magistrate, it was said, had power, *proprio motu*, to make inquiries, but did not derive the power from that section.—*Reg.* v. *Ramdharry Singh*, 10 W. R., Cr., 5. See *Eadara Virana* v. *Queen*, I. L. R., 3 Mad., 400.

It is undesirable, it was said, that the same Judge who has heard the evidence and expressed an opinion upon it in a civil case should also be the Judge to try a prisoner upon a charge arising out of the civil case supported by the same evidence; but a conviction is not necessarily bad for this reason.—*Queen* v. *Subal Chunder Gangooly*, 22 W. R., 16. But now see s. 487, *infra.*

Ch. XV s. 195 When a Civil Court sends a prisoner before a Magistrate on a charge of forgery, it is competent to the Magistrate to commit the prisoner for trial on a charge either of forgery or of using as genuine a false document or of abetting forgery. —*Queen* v. *Mohesh Chunder Acharjee*, 6 W. R., Cr., 20.

The sanction required by this section is not to be given in any particular form of words. In the case of *Sheo Churn Petitioner*, 2 Wym. Cr. Rul., 59, where a false charge was dismissed by the Magistrate of the District, an order passed by him referring the complaint of the defendant made under s. 211 of the Indian Penal Code to a Deputy Magistrate for trial, was held to be a sufficient sanction for the prosecution of the case.

Although it is not legally imperative that the sanction to prosecute should be in writing, it is very desirable that such sanction or direction should be put in writing and attached to the record.—*Mad. H. C. Pro.*, *7th February* 1872, *Weir*, p. 29.

A Bombay High Court Circular directed that a formal sanction should be given under the seal of the Court and the signature of the presiding officer, and should be recorded in the proceedings in the trial, whether the Court before whom the offence is committed takes proceedings against the offender or not. The production of such an order under the seal of the Court and signature of the presiding officer is to be accepted as *primâ facie* evidence of the sanction.—*Bom. H. C. Cir.*, 42.

Sanction was implied where the conviction, which was for non-attendance in obedience to a summons, was by the same Magistrate whose summons was treated with contempt.—*Reg.* v. *Ganu bin Tatia Selar*, 5 Bom. H. C. R., Cr., 38.

The sanction accorded by a Civil Court under this section in a case under s. 193 of the Indian Penal Code need not be more specific than a general sanction to prosecute for any false statement contained in the two depositions given.—*Reg.* v. *Kadir Bux*, 11 W. R., Cr., 17.

Nature of sanction.—The first part of the fourth paragraph which deals with the nature of the sanction corresponds with the first paragraph of s. 470. See *Essan Chunder Dutt* v. *Prannauth Chowdhry*, Marsh., 270. The second part of the paragraph is new. It follows the decision in the case of *In re Balaji Sitaram*, 11 Bom. H. C. R., 34. See *Empress* v. *Dala Jiva*, I. L. R., 10 Bom., 190. In the former case, the Court further expressed an opinion that it was desirable, if not necessary, that, in the sanction, the description of the offence intended to be prosecuted should be stated in general terms, although details might be omitted. See *Queen* v. *Ooma Moye Debea*, 13 W. R., Cr., 25. But the particular offence or offences for the prosecution of which sanction is given should be stated with precision.—*Ibid.*

A Magistrate making a commitment for giving false evidence must set out the precise words recorded as used by the accused, containing the statement which he undertakes to prove to be false and not state the effect of those words.—*Queen* v. *Soondor Mohooree*, 9 W. R., Cr., 25; *Queen* v. *Kartick Chunder Holdar*, 9 W. R., Cr., 58; *Queen* v. *Boodhun Ahir*, 17 W. R., Cr., 32. If, however, the defect is not such as to mislead the accused, the High Court will not interfere.—*Queen* v. *Adhya Thakoor*, *ib.*, 33. In a case of forgery, it should be stated distinctly what the document is for which a prosecution is to be entertained, the particular act or acts of forgery; and in a case of perjury, the particular words which constitute the perjury should be specified.—*In re Govind Chunder Ghose*, 10 W. R., Cr., 41.

The sanction ought to specify the section or sections under which the criminal proceedings are to be taken, as also, in a general way, the offence or offences to be charged, the date of commission, and the place where committed.—*In re Parsotam Lall*, I. L. R., 6 All., 101, *per* STRAIGHT, J., who went on to say: "I think it well that judicial officers, in granting sanctions under s. 195 of the Criminal Procedure Code, should be clear and precise upon the matters I have indicated, in order that the Magistrates who have to entertain the prosecutions may accurately know the exact offence or offences in respect of which proceedings have been authorized." In cases of perjury it should specify in substance the assignment of perjury and the sections under which proceedings are authorized.—*In re Har Dial* v. *Durga Prasad*, I. L. R., 6 All., 105.

It will be observed, from the cases quoted, that the tendency of the Courts is to hold that sanction granted under the section should be as precise as possible, especially in cases of perjury and forgery. The section provides that, where

sanction has been given in respect of any offence referred to in the section, the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts. Thus, where sanction has been given to prosecute, under s. 182, for false information with intent to cause a public servant to use his lawful power to the injury of another person, the section would allow the Court taking cognizance of the case to frame a charge, under s. 211, of bringing a false charge. See *Rajcoomar* v. *Kirtu Ojha*, 13 W. R., Cr., 67. Ch. XV s. 195

Where a charge has been made not requiring sanction, but a new charge requiring sanction is substituted or added, the Court must be guided by s. 230, *post*, which provides that, if the offence stated in the new or altered charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded. See ss. 226 and 227 as to alteration of charges.

An instruction to a Magistrate of the District by the Court of Session, contained in the concluding sentence of its judgment in a case tried by it, to prosecute a person for giving false evidence before it in such case, did not amount, it was held by PEARSON, J., to sanction to a prosecution within the meaning of s. 468 of Act X of 1872, that section contemplating a complaint or at least an application for sanction for a complaint.—*Empress* v. *Gobardhan Dass*, I. L. R., 3 All., 62. The High Court at Calcutta, however, decided otherwise in the case of *In re Jugut Mohinee Dassee*, 10 C. L. R., 4. In that case it was held, not only that it was not necessary that sanction to prosecute under s. 211 of the Penal Code should only be granted on an application by a private prosecutor, but that a District Magistrate was competent, of his own motion, to direct a prosecution, where a complaint had been entertained and found to be false by a Magistrate subordinate to him. See *In re Giridhari Mondul*, 10 C. L. R., 46; (S. C.) I. L. R., 8 Calc., 435; *Ishri Prasad* v. *Sham Lal*, I. L. R., 7 All., (F. B.), 871.

In the case of *Jadunath Hazra* v. *Annoda Prosad Sircar*, 11 C. L. R., 53, a Moonsiff, upon an application for sanction to prosecute under s. 207 of the Indian Penal Code, made the following order on the petition: "If the petitioner thinks there is sufficient evidence against A, there is no objection to give the sanction asked for herein." The High Court held that this sanction was not sufficient. So, in the case of *Abbilakh Singh* v. *Khub Lall*, I. L. R., 10 Calc., 1100, which was overruled on another point by the Full Bench in the case of *In re Krishnanundo Das*, I. L. R., 12 Calc. (F. B.), 58, a sanction in the words—"sanction to prosecute is awarded"—was held to be clearly not a compliance with the law which requires that a sanction "shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed."

The sanction need not name the accused person. See *In re Govindan Nayan*, I. L. R., 7 Mad., 224, *per* HUTCHINS, J. (quoted *supra*).

If, in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear grounds for believing that either the parties to the proceeding or their witnesses have committed perjury or any other offence against public justice, he is justified in directing criminal proceedings against such persons without any further inquiry than that which he has already held in his own Court.—*In re Mutty Laul Ghose*, I. L. R., 6 Calc., 308. See s. 476, *infra*.

The fifth paragraph of this section is based upon the second paragraph of s. 470 of Act X of 1872. See also Act X of 1875, s. 134, and Act IV of 1877, s. 43. By s. 470, however, it was provided that the sanction might 'be given at any time,' and these words, it was held, must be construed reasonably, and that 'any time' meant a time which did not unduly prejudice the party to be prosecuted or put him in a worse position than he was before.—*Seetaram Sahoo* v. *Rai Baboo Shewgolam Sahoo*, 18 W. R., Cr., 62. Questions arose under Act X of 1872 as to whether a sanction granted after commitment was legal. See *Mohima Chunder Chuckerbutty*, 15 W. R., Cr., 45; and *In re Golak Singh*, 3 B. L. R., Ap. Cr., 10. Such questions are now put at rest by this section, which provides that no Magistrate shall take cognizance of the offences mentioned except with *previous* sanction of a Court.

The 6th, 7th, and 8th paragraphs of the section are new.

Complaint.—The words "except with the previous sanction or on the complaint of the public servant concerned" must be read in connection with s. 476, *post*,

Ch. XV s. 195 which was enacted with the object of avoiding the inconvenience which might be caused if a Moonsiff, Subordinate Judge or a Judge were obliged to appear before a Magistrate and make a complaint like an ordinary complainant in order to lay the foundation for a prosecution. The language of s. 476 indicates that where *a Court* is acting under s. 195, a complaint in the strictest sense of the word is not required, and that the procedure therein laid down constitutes the "complaint" mentioned in s. 195.—*Ishri Prasad* v. *Sham Lal*, I. L. R., 7 All., F. B., 871, *per* PETHERAM, C. J., and STRAIGHT, J. In that case a Moonsiff made an order which he described as passed under s. 643 of the Civil Procedure Code (Act XIV of 1882), and in which he directed that certain persons, who had committed offences before him under ss. 193, 463, and 471 of the Penal Code, should be sent before the Magistrate, and that the Magistrate should inquire into the matter. The Full Bench held that the order, whether it was or was not a sanction, was a sufficient complaint within s. 195, and that the limitation period prescribed by that section was not applicable to the case. See *Queen* v. *Yendava Chandramma*, I. L. R., 7 Mad., 189.

Section 643 of the Civil Procedure Code is as follows:—When, in a case pending before any Court, there appears to the Court sufficient ground for sending for investigation to the Magistrate a charge of any such offence as is described in ss. 193, 196, 199, 200, 205, 206, 207, 208, 209, 210, 463, 471, 474, 475, 476, or 477 of the Indian Penal Code, which may be made in the course of any other suit or proceeding, or with respect to any document offered in evidence in the case, the Court may cause the person accused to be detained till the rising of the Court, and may then send him in custody to the Magistrate, or take sufficient bail for his appearance before the Magistrate.

The Court shall send to the Magistrate the evidence and documents relevant to the charge, and may bind over any person to appear and give evidence before such Magistrate.

The Magistrate shall receive such charge, and proceed with it according to law.

Jurisdiction.—The discretion vested in a Civil Court of sanctioning a criminal charge of perjury is one that should be most carefully exercised.—*Queen* v. *Poosa Ram*, 6 W. R., Cr., 11.

As soon as it becomes apparent that a complaint is of an offence falling within this section, and that it is made without sanction, the Magistrate is not competent to entertain it.—*Proceeding, 16th Feb.* 1875, 8 *Mad. H. C. R., Appx., ii, Weir*, p. 30.

In the case of *Barkatulla* v. *Rennie*, I. L. R., 1 All., 17, it was held by a Full Bench at Allahabad, that when the Court, in which evidence in a case had been given, had, under s. 468 of the Criminal Procedure Code, sanctioned criminal proceedings, no superior Court had any right to question the propriety of that sanction. In Calcutta, also, it was held by a Full Bench, in the case of *In the matter of Ram Prosad Hazra*, B. L. R., Sup. Vol., 426; (S. C.) 5 W. R., Mis. Rul., 24, that where, in the course of a suit, a Civil Court committed a party for trial, or sanctioned criminal proceedings against him, on a charge of perjury or forgery, the High Court could not, as a Court of Revision, reverse such sanction or order, upon the ground that it was not warranted by the facts. See also *Gopal Mozumder* v. *Hurro Soonderi Boistomee*, 16 W. R., Cr., 69. In the case of *Barkatulla Khan* v. *Rennie*, I. L. R., 1 All., Full Bench, 17, SPANKIE, J., was of opinion that where sanction had been withheld by the subordinate Court, the superior Court might, by virtue of its superiority, grant sanction; but that it should be the practice of all superior Courts to refuse to entertain an application until it was shown that an application had been made to the subordinate Court, and by that Court sanction had been refused.

The power which, under the 6th paragraph of this section, a superior Court has to grant or revoke a sanction which has been refused or granted, may be exercised by an Appellate Court by way of revision.—*Section* 439, *infra.* But where sanction has been refused by a subordinate Court, the High Court will not exercise the discretion given to it by this section, unless it appears very clearly that there are strong grounds for granting the sanction.—*Money Mohun* v. *Dey Denonath Mullick*, 22 W. R., Cr., 11. But it seems a Sessions Judge may order the committal of a person accused of giving false evidence after the discharge of such person by the Magistrate.—*Reg.* v. *Bhohisan Mahutoon*, W. R., Cr., Sup. Vol., 3.

Notice.—It was held by a Full Bench, overruling the case of *Abbilakh Singh* v. *Khub Lal*, I. L. R., 10 Calc., 1100, on that point, that no notice is necessary to the person against whom it is intended to proceed, before a Court, before which the alleged offence has been committed, can grant sanction to prosecute.—*In re Krishnanund Das*, I. L. R., 12 Calc. (F. B.), 58. Before, however, granting sanction, the Court is bound to satisfy itself that an offence has been committed, but it is not bound to hold an inquiry as to all the persons who may be implicated in such offence.—*In re Govindan Nayan*, I. L. R., 7 Mad., 224, for the section itself provides that the sanction need not name the accused.

On an application for sanction to prosecute, it is not competent to the Court to go beyond the record in determining whether or not sanction should be granted where the record itself discloses no foundation for the charges.—*Sangili Vira Chinnatambiar* v. *Queen*. I. L. R., 6 Mad., 29, *per* INNES, Offg. C. J., and KERNAN, J.; see *In re Kasi Chunder Mozumdar*, I. L. R., 6 Calc., 440; (S. C.) 7 C. L. R., 330. In the former case, the plaintiff, in a civil suit to set aside an order of demarcation under s. 25 of the Madras Boundary Act, filed certain copies of settlement accounts. When the case came on, the clerk of the Collector's office was in attendance under a subpœna to produce the originals, which were alleged to be forged. No evidence was given of the forgery. The plaintiff's vakil retired from the case, and the suit was dismissed. Subsequently, the defendant's counsel applied for sanction to prosecute the plaintiff under s. 471 of the Indian Penal Code, and sanction was granted. The Madras High Court, however, held that, upon the record itself, there was no evidence giving rise *per se* to a suspicion of the offence charged, and set aside the order granting sanction.

The sanction should not be granted without a preliminary inquiry where such enquiry is necessary under s. 476 of the Code.—*Empress* v. *Narotam Dass*, I. L. R., 6 All., 98. In the case of *In re Parsotam Lal*, I. L. R., 6 All., 101, where a Moonsiff gave sanction to prosecute for forgery, where the question whether a bond had been executed or not was, after suit brought, by consent of the parties, referred to arbitration, and the arbitrator decided that the bond was a forgery, it was held by STRAIGHT, J., that the Moonsiff, not having determined the question of forgery himself, ought to have held a preliminary inquiry to satisfy himself that there were materials to justify a prosecution. It will be observed that in this case the document alleged to be forged was not actually given in evidence in the proceedings before the Court, though it was given in evidence in a proceeding before the arbitrator directed by the Court.

Subordination of Magistrates.—The penultimate paragraph of this section seems to have been suggested by the remarks of MELVILL, J., in the case of *Empress* v. *Padmanabh Pai*, I. L. R., 2 Bom., 384, where it was held by the Bombay High Court, that a Magistrate of the first class was subordinate to the Magistrate of the District, so that a sanction given by the latter to prosecute a person for intentionally giving false evidence before the former was legal and sufficient. "We should certainly have preferred," said MELVILL, J., in that case, "to hold that, for the purposes of ss. 468 and 469, a Magistrate of the first class is subordinate, not to the Magistrate of the District, but to the Court of Session. It is very essential that the Court of Session, either when sitting in appeal or when trying a case committed to it by a Magistrate of the first class, should have the power to sanction a prosecution for the offence of giving false evidence or of forgery committed in the Court of the Magistrate. . . . . . . But, in the absence of any express provision to that effect in the Code, it is impossible not to see that it should be difficult to hold that the Court of Session has such power in the face of the words of s. 37 (corresponding with s. 17, para. 4, *supra*)." See also *In re Gur Dayal*, I. L. R., 2 All., 205.

It will be observed that, for the purposes of this section, it is now declared that every Court other than a Court of Small Causes shall be deemed to be subordinate only to the Court to which appeals ordinarily lie.

For the purpose of sanctioning a criminal prosecution, the Court of the Subordinate Judge is subordinate to that of the District Judge, notwithstanding that the subject-matter of the litigation in the former Court involves more than Rs. 5,000, and an appeal lies direct to the High Court.—*Empress* v. *Lakshman Sakharam*, I. L. R., 2 Bom., 481. In the case of *Queen* v. *Velayudam Pillai*, I. L. R.,

Ch. XV s. 196 6 Mad., 146, it was held in the Madras Presidency, that a second class Magistrate of a talook, but being the official superior of a Police Stationhouse Officer, could not sanction a prosecution under s. 182 of the Indian Penal Code for giving false information to the Stationhouse Officer.

Revocation.—A District Court has jurisdiction to revoke or grant a sanction granted or refused by a Subordinate Judge's Court.—*Shekata* v. *Mathusami*, I. L. R., 7 Mad., 314. A Subdivisional Magistrate cannot sanction the prosecution of a witness for perjury in the Court of a Magistrate subordinate to him.—*Empress* v. *Kuppu*, I. L. R., 7 Mad., 560.

Limitation.—It seems to have been considered that it is competent to a Court which has granted sanction to a prosecution to give a fresh sanction if the one previously granted has expired by efflux of times.—*In re Gulab Singh* v. *Debi Prosad*, I. L. R., 6 All., 45. But where sanction has been granted and has ceased after six months to be in force, fresh sanction ought not to be granted, assuming it can be granted at all, unless some explanation is given for the omission to commence proceedings under the first sanction within six months. See *Joydeo Singh* v. *Hurihar Pershad Singh*, I. L. R., 11 Calc., 577. The limitation in the section means that the Magistrate shall not take cognizance of a case under a sanction which is more than six months old, not that the whole prosecution must be completed in that time.—*In re Gulab Singh* v. *Debi Prasad*, I. L. R., 6 All., 45.

In the case of *In re Gulab Singh* v. *Debi Prosad*, I. L. R., 6 All., 45, sanction had been obtained, but in consequence of the evidence of the complainant not being procurable, the Magistrate ordered "the case to be shelved for the present." It was held, on the complainant, after the six months had expired, applying that the proceedings might be re-opened, that it was not necessary that fresh sanction should be given.

A Mamlatdar's Court instituted by Bom. Act III of 1876 is a Civil Court within the meaning of this section.—*In re Savanunta*, I. L. R., 5 Bom., 137; *Mahadaji* v. *Sonu*, 9 Bom. H. C. R., 249; and *Bai Jamna* v. *Bai Jadav*, I. L. R., 4 Bom., 168; and accordingly sanction is required in case of an offence mentioned in the section. See *Empress* v. *Sabsubh*, I. L. R., 2 All., 353.

It is not necessary that sanction should be given before instituting a charge under s. 82 of the Registration Act, III of 1877, for making false statements on oath, although the offence charged is of the same nature as that punishable under s. 193 of the Indian Penal Code.—*Gopi Nath* v. *Kuldip Singh*, I. L. R., 11 Calc. (F. B.), 566. See *Empress* v. *Batesur Mandal*, I. L. R., 10 Calc., 604.

Where a pardon is legally tendered under s. 336, *post*, and the accused makes a statement on oath, which he retracts in a subsequent judicial proceeding, a proper sanction is necessary for a prosecution for giving false evidence on each branch of an alternative charge of giving false evidence, and such sanction must, of course, under this section, be granted before, and not after, the commencement of the prosecution.—*Empress* v. *Dala Jiva*, I. L. R., 10 Bom., 190.

Prosecution for offences against the State.

196. No Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code, except section 127, or punishable under section 294A of the same Code, unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government, or some officer empowered by the Governor General in Council, in this behalf.

This section corresponds with s. 465 of Act X of 1872, s. 131 of Act X of 1875, and ss. 38 and 46 of Act IV of 1877.

The second clause of the section is in accordance with the ruling in the case of *Reg.* v. *Ninayak Divakar*, 8 Bom. H. C. R., Cr., 32.

Chapter VI of the Penal Code deals with offences against the State.

197. Prosecution of public servants — necessary sanction — indefiniteness of sanction — An order by the Board of Revenue sanctioning the prosecution of a Deputy Tahsildar by the Collector of the District for "bribery or such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation by a Criminal Court" is not a legal sanction within the meaning of the Criminal P. Code § 197, and a commitment on any of such charges should be quashed.

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Section 127 of the Penal Code deals with the receiving of property taken by war against the Government of any Asiatic Power in alliance or at peace with the Queen, or by depredation on the territories of any power in alliance or at peace with the Queen.

Section 294A of the same Code deals with the keeping of lotteries.

The parties concerned in keeping a lottery and issuing proposals for a lottery without the authority of Government are not liable to prosecution except under the sanction of the Government.—*Act XXVII of* 1870, *s.* 14. Before deciding not to proceed against the parties concerned in a lottery, the District Magistrate should fully investigate the matter and take the orders of Government.—*Mad. Notification, 4th June* 1874, *Weir*, p. 82. See G. O. of Govt. of India, dated 1st Nov. 1877, No. 329, embodied in G. O., Madras, dated 20th November 1877, No. 2738.

Prosecution of Judges and public servants.

197. When any Judge, or any public servant not removable from his office without the sanction of the Government of India or the Local Government, is accused as such Judge or public servant of any offence, no Court shall take cognizance of such offence, except with the previous sanction of the Government having power to order his removal, or of some officer empowered in this behalf by such Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government..

Power of Government as to prosecution.

Such Government may determine the person by whom, and the manner in which, the prosecution of such Judge or public servant is to be conducted, and may specify the Court before which the trial is to be held.

This section consolidates the provisions of paras. 1, 2, 3, and 4 of s. 466, Act X of 1872; see s. 132 of Act X of 1875 and ss. 39 and 46 of Act IV of 1877.

The High Court at Bombay has held that this section applies to all acts ostensibly done by a public servant,—*i. e.*, to acts which would have no special signification except as acts done by a public servant.—*Empress* v. *Lakshman Sakharam*, I. L. R, 2 Bom., 481.

As to the definition of 'Judge' and 'public servant,' see ss. 19 and 21 of the Indian Penal Code, and s. 4 (*w*), *ante*, p. 8, which makes these definitions applicable under this Act.

The Calcutta High Court has held that the charges, which, under s. 466 (197 of the present Code) of the Code of Criminal Procedure, cannot be entertained against the officers therein described, except under the sanction or direction of the Local Government or other competent authority, relate to offences which can be committed by public servants *as such*, and which are specified in Chap. IX of the Indian Penal Code, and to no other. Offences committed against the person or property of individuals by one who happens to be a public servant are not necessarily committed by him *as such public servant* in the sense in which those words are used in the Penal Code, and, unless committed in that character, must be regarded as the acts of *individuals in their private capacity*; charges, therefore, founded on such acts do not need the sanction of Government or other competent authority aforementioned before they can be entertained by a Criminal Court, but should be dealt with in the same way as charges against individuals ordinarily are. —*Calc. H. C. C. O., No.* 20 *of 4th October* 1864, *Wilkins*, p. 114. See, however, the remarks of MELVILL, J., in *Reg.* v. *Purashram Keshav*, 7 Bom. H. C. R., Cr., 61,

Ch. XV s. 197 commenting on that circular order and the explanation of these remarks given by WEST, J., on reference to MELVILL, J., in the case of *Empress* v. *Lakshman Sakharam*, I. L. R., 2 Bom., 409, p. 485.

Section 132 provides that no prosecution against any Magistrate, military officer, Police-officer, soldier or volunteer for any act purporting to be done under Chap. IX of this Code which relates to unlawful assemblies shall be instituted in any Criminal Court, except with the sanction of the Governor-General in Council; and

(*a*) no Magistrate or Police-officer acting under that chapter in good faith,

(*b*) no officer acting under s 131 in good faith,

(*c*) no person doing any act in good faith in compliance with a requisition under s. 128 or s. 130, and

(*d*) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which under military law he was bound to obey,

shall be deemed to have thereby committed an offence.

Section 537, *post*, provides that no finding, sentence, or order of any competent Court shall be reversed or altered under Chap. XXVII, or on appeal or revision, on account of the want of sanction under s. 195, unless the omission has caused a failure of justice. It is silent as to want of sanction required under s. 132 or 197.

A municipal corporation is not a 'public servant' within the meaning of this section.—*Empress* v. *Municipal Corporation of Calcutta*, I. L. R., 3 Calc., 758; (S. C.) 2 C. L. R., 520. And the protection extended by it to certain individual public servants does not extend to such a corporation prosecuted under the Penal Code for creating a public nuisance.—*Ibid;* see *Reg.* v. *Birmingham and Gloucester Ry. Co.*, 3 Q. B., 223; *Reg.* v. *Scott*, 3 *ib.*, 547; *Reg.* v. *Great Northern Ry. Co.*, 9 *ib.*, 315.

In the case of the *Empress* v. *Municipal Commissioners of Calcutta*, AINSLIE, J., said:—"By s. 11 of the Penal Code, the word 'person' is defined to include a body of persons whether incorporated or not, and therefore the word 'person' in s. 21 may be read as a body of persons incorporated. The word 'public servant' in that section may, consequently, denote a body of persons incorporated falling under any of the descriptions given therein. . . . . The class of public servants referred to (in s. 39 of Act IV of 1877) consists of those who are 'not removable from office without the sanction of Government.' But if the whole be read as describing the class exempted from prosecution without the previous sanction of Government, the description can only be applied to a class not removable from office at all, by dropping the words 'without the sanction of Government,' which have no meaning as applied to such public servants. . . . . It does not seem to me that it must necessarily be implied that by the words 'not removable from office without the sanction of Government,' it was the intention of the Legislature to include those who are not removable from office under any circumstances at all."

Section 466 of Act X of 1872 was held not to apply to a prosecution of a police patel in the Bombay Presidency.—*Empress* v. *Bhugwan Devraj*, I. L. R., 4 Bom., 357; *Empress* v. *Irbasapa*, *ib.*, 479.

The Madras Government, by a notification, dated the 27th August 1873, notified that, under cl. 1 of s. 466 of the Criminal Procedure Code, the power to direct or sanction the entertainment of complaints of offences committed in their public capacity by Subordinate Magistrates, Tahsildars, and Deputy Tahsildars had been restricted by the Governor of Madras in Council to the Board of Revenue; and in continuation of the above notification it was further notified, on the 13th September 1873, that, in regard to all other classes of Magistrates, the like power was reserved to the Governor of Madras in Council.—*Madras Gazette*, 1873, p. 1503.

Where, after a magisterial inquiry, a European British subject, being a public servant within the meaning of this section, was committed for trial to the High Court of Bombay by the Judicial Superintendent of Railways in His Highness the Nizam's dominions, without any previous sanction as required by the section, a Full Bench of the Bombay High Court held, that the proceedings were irregular and without jurisdiction, and that a sanction subsequently obtained was of no effect.

Conviction of offence under § 498 although husband did not complain of that offence

1997. Where the husband of the woman, charged the accused with an offence under section 366 I.P.C (Kidnapping a woman [with to compel her marriage]) and the magistrate convicted the accused under section 498 I.P.C. Held that such a case is within the intention of section 238 Crim. P. Code. The intention of the law is to prevent magistrates inquiring of their own motion, into cases connected with marriage unless the husband or other person authorized moved them to do so. But when the husband is complainant and brings his complaint under section 366 I.P.C a conviction under § 498 may properly be had if the evidence be such as to justify a conviction for the minor offence and yet insufficient for a conviction for the graver one.

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But it held also that the provision of s. 532, *post*, applied, and that the Judge presiding at the criminal session of the High Court had power, in his discretion, to accept the commitment and to proceed with the trial of the prisoner.—*Empress* v. *Morton*, I. L. R., 9 Bom., 288.

Prosecution for breach of contract, defamation and offences against marriage.

198. No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence.

Compare s. 142, para. 2, of Act X of 1872 and s. 29 of Act IV of 1877.

Chapter XIX of the Penal Code deals with criminal breach of contracts of service; Chap. XXI, with defamation.

See *Nur Aslam*, Panjab Rec., 1884, p. 42. Suppose a firm (all the members of which are in England) is carried on in Calcutta through a manager, and it is defamed. Apparently no prosecution could proceed upon the complaint of the manager, unless he were specially aggrieved.

Sections 493, 496 of the Penal Code relate to marriage.

Under this section, when a case relating to marriage is once properly before the Magistrate, he may proceed against any person implicated. Thus, where, in an inquiry as to the abduction of a wife, it appears that the wife has committed bigamy, the Magistrate may, without further complaint, commit the woman for the latter offence.—*In re Ujjala Bewa*, 1 C. L. R., 523. See s. 238, *post*.

Prosecution for adultery or enticing a married woman.

199. No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed.

This section consolidates the provisions of ss. 478 and 479 of Act X of 1872; see s. 45 of Act IV of 1877.

Sections 497 and 498 relate to adultery and to the enticing, or taking away or detaining, with a criminal intent, married women.

It seems to have been doubtful whether the formal assent of a husband to a charge of adultery added at the end of his deposition is a proper compliance with this section.—*Reg.* v. *Luckhy Narain Nagory*, 24 W. R., Cr., 18. In the case, however, of *Rahmatulla* v. *Empress*, Panjab Rec., 1883, p. 12, the complainant informed the police and filed a petition before the Magistrate that the accused had committed a rape on his wife and prayed that the accused might be punished under s. 376 of the Penal Code. The police, after inquiry, reported to the Magistrate that the case was one of adultery and not of rape, whereupon the Magistrate directed that the accused should be brought up. In his deposition before the Magistrate the complainant stated that he wished to proceed against the accused for adultery. The Court considered that this statement was not a sufficient compliance with the law, which lays down that a complaint under s. 497 of the Penal Code shall not be instituted except upon a complaint made by the husband of the woman. The Court stated that it shared the doubts expressed by the High Court of Calcutta in the case of *Reg.* v. *Luckhy Narain Nagory*, 24 W. R., Cr., 18.

The case of *Empress* v. *Kallu*, I. L. R., 5 All., 233, was similar to that in the Panjab Chief Court, and there the High Court at Allahabad held that a formal complaint was necessary.

In all criminal cases, except those referred to in ss. 478 and 479, corresponding with this section, it was directed by the High Court of the N.-W. Provinces

Ch. XVI s. 200 that the prosecution be designated 'Queen-Empress.'—*N.-W. Provinces Gazette*, 1879, p. 123.

Where a complaint was made to a Magistrate accusing a certain person of having taken or kept the wife of the complainant, it appeared in the course of the proceedings that the wife had committed bigamy, whereupon the Magistrate, without a further complaint, committed the wife alone for trial by the Court of Session,—it was held, that the Magistrate had acted within his jurisdiction.—*In re Ujjala Bewa*, 1 C. L. R., 523. See s. 238, *post*.

A minor husband cannot be represented by another for the purpose of instituting a prosecution.—*Mad. H. C. Pro.*, *7th February* 1817, *Weir*, p. 29.

This section does not require the consent of the husband to a prosecution for house-trespass with intent to commit adultery.—*Mad. H. C. Pro.*, *18th June* 1868 *and 15th November* 1869, *Weir*, p. 29.

The death of the husband does not put an end to a prosecution for adultery. All that the law requires is, that the prosecution should be instituted by the husband.—*Mad. H. C. Pro.*, *13th July* 1869, *Weir*, p. 29.

A Magistrate having committed an accused for trial on a charge of adultery is not competent to discharge the accused on the representation of the prosecutor that he wishes to withdraw from the prosecution.—*Empress* v. *Jangbir*, I. L. R., 4 All., 150, as a commitment can only be quashed by the High Court.—*S*. 215.

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES.

200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate :

Examination of complainant.

Provided as follows—

(*a*) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under section 192 :

(*b*) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and need not be reduced to writing ; but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing :

(*c*) when the case has been transferred under section 192, and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

As to the first paragraph, compare s. 144 of Act X of 1872. The examination must now be upon oath. Under s. 44 of Act X of 1872, it was optional on the part of the Magistrate to examine the complainant before transferring a case under that section, whether the complaint was in writing or not. Now the Magistrate need only examine the complainant when the complaint is not in writing. As to

proviso (*b*), see Act IV of 1877, s. 30; and as to proviso (*c*), see the latter part of para. 2 of s. 44, Act X of 1872. Ch. XVI s. 200

See note to s. 192, *supra*, as to Magistrates empowered under that section to transfer cases.

A complaint means the allegation, made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include the report of a Police-officer.—*S.* 4 (*a*), *supra.*

Court-fees.—An application or petition containing a complaint or charge of any offence other than offence for which Police-officers may, under the Criminal Procedure Code, arrest without warrant and presented to any Criminal Court, must have an 8-anna court-fee stamp.—*Court Fees Act, VII of* 1870, *Sched. II*, 1 (*b*).

When the first or only examination of a person who complains of the offence of wrongful confinement, or of wrongful restraint, or of any offence other than an offence for which Police-officers may arrest without a warrant, and who has not already presented a petition on which a fee has been levied, is reduced into writing under the Criminal Procedure Code, the complainant shall pay a fee of 8 annas, unless the Court thinks fit to remit such payment.—*Ib.*, *s.* 18. The Court, if it convict the accused person, shall, in addition to the penalty imposed, order him to repay to the complainant the fee paid on the application or petition or for the examination.—*Ib.*, *s.* 31.

The complaint of a public servant (as defined in the Indian Penal Code), a municipal officer, or an officer or servant of a Railway Company is exempt from the payment of a fee.—*Ib.*, *s.* 19, xviii.

Where a Magistrate, without having first examined the complainant, dismissed the complaint, and directed the complainant to be prosecuted under s. 182 of the Penal Code, a conviction under that section was set aside on the ground that the dismissal of the complaint had been irregular by reason of the non-examination of the complainant.—*In re Biyogi Bhagut*, 4 C. L. R., 134: see also *Re Bullee Singh*, 17 W. R., Cr., 2. The rule as to prosecutions under s. 211 of the Indian Penal Code is that where a complaint has been made before a Magistrate, and the case is dismissed without all the witnesses whom the person accused of making the false charge wishes to produce in Court being examined, sanction to prosecute under s. 211 of the Indian Penal Code cannot be given under s. 195, *supra.*—*In re Russick Lall Mullick*, 7 C. L. R., 382; *Empress* v. *Karimdad*, I. L. R, 6 Calc., 496; (S. C.) 7 C. L. R., 467; *In re Sakhina Bibi*, 8 C. L. R., 387; (S.C.) I. L. R., 7 Calc., 87; *In re Cukradar Potti*, 8 C. L. R., 289; *Empress* v. *Shibo Behara*, I. L. R., 6 Calc., 584; (S. C.) 8 C. L. R., 265. See *In re Gyan Chunder Roy* v. *Protap Chunder Dass*, I. L. R., 7 Calc., 208; (S. C.) 8 C. L. R., 267; and *Syed Nissar Hossain* v. *Ramgolam Singh*, 25 W. R., Cr., 10. But see *Bhawani Prosad*, I. L. R., 4 All., 182.

Where no complaint is made before a Magistrate, but a charge is laid before the police, and that charge is found to be false, it is not necessary, before a prosecution can be instituted under s. 211 of the Penal Code, to obtain the sanction of a Court.—*Government of Bengal* v. *Gokool Chunder Chowdhry*, 24 W. R., Cr., 41; *Ram Runpur Bhandari* v. *Madhub Ghose*, 25 W. R., Cr., 33; *Queen* v. *Gour Mohun Singh*, 16 W. R., Cr., 44; *Empress* v. *Irad Ally*, I. L. R., 4 Calc., 869; (S.C.) *nom. Nusibunissa Bibi* v. *Sheikh Erad Ali*, 4 C. L. R., 413; *Empress* v. *Abdul Hasan*, I. L. R., 1 All., 497; *Empress* v. *Salik Roy*, I. L. R, 6 Calc., 582; (S.C.) 8 C. L. R., 255: see *Ashrof Ali* v. *Empress*, I. L. R., 5 Calc., 281.

It is not competent to a Subordinate Magistrate to direct a complainant, who brings a charge of petty theft or assault ordinarily within the cognizance of Heads of villages, to seek redress from the Head of the village. Complaint having been duly made, the Subordinate Magistrate is bound to proceed under the section and dispose of the case according to law.—*Mad. H. C. Pro.*, 18*th Dec.* 1873, *Weir*, p. 6.

The proper mode of ascertaining what a complaint is, is to examine the complainant and reduce his examination to writing. If it is then ascertained that the complaint is not of an offence, the order dismissing it should still be in writing. It is irregular to endorse and return to a party his petition or complaint alleging an offence. Such papers form part of the records of the Court, and should

Ch. XVI s. 200 not be returned to the party. What the party is entitled to, is an authenticated copy of the Magistrate's order on the proper stamp.—*Mad. H. C. Pro.*, *10th June* 1869, *Weir*, p. 6. As to cases where the Magistrate has no jurisdiction, see next section.

Until the complainant has been examined, process cannot be issued; nor can the plaint be dismissed.—*Proceedings*, 4 *Mad. H. C. R.*, 162, *Weir*, p. 7.

Where a complaint of theft was made to a Magistrate of the third class, who returned the petition to the complainant, with an endorsement that he should obtain redress from the village Magistrate, it was held that this procedure was unauthorized. A complaint having been made to him, he was bound to proceed under the Code and dispose of the complaint according to law. The fact that the complaint was also cognizable by the Head of the village did not affect the competency of the Magistrate, nor could he thus decline to exercise his jurisdiction.—*Mad. H. C. Pro.*, 7 *Mad.*, *Appx.*, *xxxi*.

A charge properly laid under the Penal Code should be investigated, even if the case be one in which a civil action will lie.—*Khosal Singh* v. *Toolshee Chowdhry*, 10 W. R., Cr., 40.

The examination of the complainant is not to be a *mere form*, but an intelligent inquiry into the subject-matter of the complaint, carried far enough to enable the Magistrate to exercise his *judgment* as to whether there is or is not sufficient ground for proceeding.—*Calc. H. C. C. O.*, *No.* 4 *of 25th Feb.* 1873, *Wilkins*, p. 21.

The Magistrate is bound to receive all complaints, whether they be preferred orally or in writing.—*Calc. H. C. C. O.*, *No.* 6 *of* 16*th May* 1864, *Wilkins*, p. 21.

Care should be taken, in conducting examinations of complainants, to make the inquiry sufficiently full to enable the Magistrate to judge whether there are any grounds for proceeding.—*Bombay Gazette*, 1879, p. 471. An examination confined to asking the complainant if the circumstances set forth in the complaint are true, and what evidence he has to prove them, is not sufficient. An intelligent inquiry into the subject-matter of the complaint would frequently render further proceedings unnecessary, and there would consequently be a diminution of inquiries which end in a discharge.—*Bom. H. C. Cir.*, 43. The examination is no mere formality; it is the result of the examination which ought to lead the Magistrate to determine whether he will put the machinery of the Criminal Court in motion by the issue of a summons or warrant to cause the accused person to appear before him. Section 147 (Act X of 1872) lays down that, if in the judgment of the Magistrate there be no sufficient ground for proceeding, he shall dismiss the complaint. The preliminary examination, therefore, if properly made, will frequently result in the summary dismissal of a complaint, and save an innocent person from the trouble and annoyance of appearing at the bar of a Criminal Court. In the interests of the public, therefore, as well as with a view to the rapid dispatch of work, the careful observance of the law in this particular is incumbent upon Magistrates.—*Smyth*, p. 89.

The following opinion, which has been expressed by the Chief Court of the Panjab extra-judicially on two points connected with the recording of reports made to the police in cognizable cases and the power of Magistrates to order the police to investigate such cases, was, at the request of the Local Government, published for the information of the Criminal Courts of the Panjab.

2. The first point on which the Judges were asked to express an opinion was as to whether a distinction is to be drawn between ss. 154 and 157 of the Code of Criminal Procedure in regard to the recording of reports made to the police in cognizable cases. On this point the Judges are of opinion that whereas every information covered by s. 154 must be reduced to writing as provided in that section, it is only information which raises a reasonable suspicion of the commission of a cognizable offence within the jurisdiction of the Police-officer to whom it is given which compels action under s. 157.

3. The second question referred to was whether a Magistrate can refuse to take cognizance of a complaint which has been duly made to him on the ground that it relates to an offence cognizable by the police, and should therefore have been made to the police and not to himself, and whether either without or after taking cognizance a Magistrate can properly order the police to investigate such a case.

4. As regards the matter of taking cognizance, the Judges are of opinion that a Magistrate cannot refuse, when properly called on to do so, to exercise jurisdiction, merely on the ground that the complainant might reasonably have had recourse to the police instead of himself. This opinion is in accordance with the rulings noted in the margin.

In the matter of Thacker v. Bhagwan Dass Harjiwan (I. L. R., 4 Bom., 489); Prosad Dass Mullick v. Russick Lall Mullick (I. L. R., 7 Calc., 157).

5. The question remains as to whether a Magistrate, after having taken cognizance, may not properly call the police to assist in investigating the case. It seems to the Judges that a Magistrate who has taken cognizance under s. 191 of an offence cognizable by the police may, after complying with the provisions of s. 200, and issuing his process (if he sees no reason for doubting the truth of the complaint and otherwise finds sufficient grounds for proceeding), give information of the case to the Police-officer having jurisdiction with a view to his further investigating its facts and circumstances in the manner laid down in s. 157. In such a case as is contemplated, the Police-officer would not have to take measures for the discovery and arrest of the offender, as the supposed offender would be known, and a process would have been issued by the Magistrate to compel his appearance; but in other respects it would rest with him to take steps to secure the case being properly brought before the Court, and he would be responsible that the witnesses named by the complainant to the Magistrate were supplemented by any others who might be necessary to complete the case for the prosecution.

6. The above remarks proceed on the assumption that the complainant to the Magistrate knows or thinks he knows who has injured him. In cases of complaint of a cognizable offence against an unknown offender, the Magistrate would have to record under s. 203 that there were in his judgment no sufficient grounds for proceeding. It would also be open to him to communicate to the police the information supplied to him, or to leave it to the complainant either to apply to the police or to take such other measures as he thought proper for discovering the offender.—*Cir. No. VIII*, 1673 *of* 1884, *dated* 27*th June* 1884; *Panjab Rec.*, 1884, *Cir. Orders*, p. 7.

Procedure by Magistrate not competent to take cognizance of the case.

201. If the complaint has been made in writing and the Magistrate is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper tribunal with an endorsement to that effect.

Compare s. 145 of Act X of 1872. That section provided that if the Magistrate was not competent to receive the complaint, he should refer the complaint to a Magistrate having jurisdiction, and this would apply whether the complaint was in writing or not. This section directs that if the complaint is in writing to a Magistrate not having jurisdiction, he shall return it for presentation to a proper tribunal with an endorsement to that effect. Apparently, therefore, whatever the intention of the Legislature might have been, this section does not cover the case of a verbal complaint to a Magistrate not competent to receive it. In the case of a verbal complaint to a Magistrate not having jurisdiction, it would be unnecessary to reduce it to writing, and sufficient to direct the complainant to apply to a Court having jurisdiction.

Postponement of issue of process.

202. If the Chief Presidency Magistrate, or any other Presidency Magistrate whom the Local Government may from time to time authorize in this behalf, or any Magistrate of the first or second class, sees reason to distrust the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the complainant has been examined, record his

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reasons for distrusting the truth of the complaint, and may then postpone the issue of process for compelling the attendance of the person complained against; and either inquire into the case himself or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a Police-officer, or by such other person, not being a Magistrate or Police-officer, as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

If such investigation is made by some person not being a Magistrate or a Police-officer, he shall exercise all the powers conferred by this Code on an officer in charge of a Police-station, except that he shall not have power to arrest without warrant.

This section applies to the police in the towns of Calcutta and Bombay.

Compare Act X of 1872, s. 146. The complainant must now be examined before the Magistrate can proceed under the section. This provision was introduced, apparently, in consequence of the remarks of L. S. JACKSON, J., in *In re Biyogi Bhagut*, 4 C. L. R., 134.

The previous inquiry provided for by this section before a complaint is taken up, ought not to be made after the accused has been brought before the Court under a warrant.—*Ramkant Sircar* v. *Jadub Chunder Dass Byragee*, 21 W. R., 44.

In the case of *Queen* v. *Yendava Chandramma*, I. L. R., 7 Mad., 189, a Magistrate of the first class, after considering the result of an investigation by a Police-officer under the section, dismissed the complaint as false and passed an order sanctioning the prosecution of the complainant for an offence punishable under s. 211 of the Penal Code, and directed a third class Magistrate to hold a preliminary inquiry, the offence being cognizable by the Court of Sessions only. It was held that, as there was no application for sanction to prosecute, the order must be taken to be a complaint made by the first class Magistrate, and therefore, under s. 476, *post*, the third class Magistrate had no jurisdiction to hold the inquiry. See s. 476, *post*.

In Presidency-towns it is only the Chief Magistrate, unless the other Presidency Magistrates have been especially empowered by the Local Government, who can direct a previous local examination. The only other Magistrates who can do so are Magistrates of the first or second class. Magistrates of the third class cannot postpone the issue of process.

Caution against the indiscriminate use of the police for the investigation of complaints.—Magistrates are cautioned against the indiscriminate use of police agency for the purpose of ascertaining matters as to which a Magistrate is bound to form his own opinion upon evidence given in his presence. This caution is especially needful in respect of cases triable under Chap. XX of the Code of Criminal Procedure and all cases regarding offences not triable by the police.—*Calc. H. C. C. O., No. 7 of 20th July* 1871, *Wilkins*, p. 108.

Dismissal of complaint.

203. The Magistrate before whom a complaint is made or to whom it has been transferred may dismiss the complaint if, after examining the complainant and considering the result of the investigation (if any) made under section 202, there is in his judgment no sufficient ground for proceeding.

Act X of 1872, s. 147, para. 1; Act IV of 1877, s. 32.

P

Where a complaint is dismissed under Sec 203 and no further enquiry is direc[illegible] [illegible] but the complainant lodged a fresh complaint which was entertained. Held that the order dismissing the original complaint under Sec 203 Cr.P.C was [illegible].

[illegible] [illegible] Bhattacharjya

[illegible] 5

The proviso as to considering the result of the investigation, if any, under s. 202 is new. Ch. XVI s. 203

The section apparently deals with the dismissal of the complaint before the issue of process against the accused; and a dismissal of a complaint under the section does not amount to an acquittal.—*S.* 403, *Expl., infra.*

If, upon any complaint duly made before a Magistrate, it should appear to him that the act imputed amounts to an offence under the Indian Penal Code or any penal law in force, and that there is *primâ facie* reason to suppose the accusation to be true, it is his duty to proceed, although he may consider that a civil suit would afford the more convenient or appropriate remedy.—*Reg.* v. *Nubas Mahton*, 8 W. R, 65.

A complaint should not be dismissed until the examination of the complainant has been recorded.—*Dulali Bewa* v. *Bhubun Shaha*, 3 B. L. R., Ap. Cr., 53. See note to s. 195, *ante*, p. 179.

Where a complaint has been made before a Magistrate, sanction for a prosecution under s. 211 of the Indian Penal Code, without examining all the witnesses whom the person accused of making the false charge wishes to produce in Court, is illegal. —*In re Biyogi Bhagut*, 4 C. L. R., 134 ; *In re Russick Lall Mullick*, 7 C. L. R., 382; *Empress* v. *Karimdad*, I. L. R., 6 Calc., 496; (S. C.) 7 C. L. R., 467; *In re Sakhina Bibi*, 8 C. L. R., 387; (S. C.) I. L. R., 7 Calc., 87; *In re Chukradar Potti*, 8 C. L. R., 289; *Empress* v. *Shibo Behara*, I. L. R., 6 Calc., 584; (S. C.) 8 C. L. R., 265. See *In re Gyan Chunder Roy* v. *Protap Chunder Dass*, I. L. R., 7 Calc., 208; (S. C.) 8 C. L. R., 267; and *Syed Nisser Hossain* v. *Ramgolam Singh*, 25 W. R., Cr., 10. But see *In re Bhawani Prosad*, I. L. R., 4 All., 182.

In a case in respect of which a warrant might issue, and which is triable under this chapter, the Magistrate ought to order the discharge of the accused persons, although they are in attendance, if he thinks that no case of a criminal character is made out against them.—*In re Niamutulla* v. *Gopal Saha*, 6 B. L. R., Appx., 6; (S.C.) 14 W. R., Cr., 63.

When a case has once been made over by a Magistrate for trial to a Subordinate Magistrate, the Magistrate's jurisdiction to do anything more in the matter ceases so long as the transfer to the Subordinate Magistrate is in existence. If the Magistrate wishes to take any further steps in the matter, or to decide the case himself, he must formally withdraw the case from the Subordinate Magistrate. Until he does so, the only person who can deal with the case is the Subordinate Magistrate to whom the trial of the case has been referred.—*Queen* v. *Belilios*, 12 W. R., Cr., 53. If the Subordinate Magistrate has issued warrants, and the Magistrate transfers the case to his own file, he must proceed with it, as from the stage where he found it, unless something occurs to show that the Magistrate who issued the warrant has made a wrong exercise of his discretion. He is not justified in suspending the warrant and dismissing the case.—*In re Raghoo Parirah*, 10 B. L. R., Appx., 26 ; (S. C.) 19 W. R., Cr., 28.

A prosecution may be maintained in respect of a false charge made to the Police or contained in a complaint which has been dismissed under this section, although there has been no judicial investigation.—*Nusibunnissa Bibee* v. *Sheikh Erard Ali*, 4 C. L. R., 413; (S. C.) I. L. R., 4 Calc., 869. It was held, upon the petition of the complainant in that case, that the order of dismissal was illegal and must be set aside, upon the ground that the complaint was dismissed without the complainant being examined. See note to s. 195, *supra*.

An order of dismissal, on account of the absence of the complainant, passed by a Magistrate under s. 124, Act IV of 1877, it was held, did not operate as an acquittal of the accused, and was no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint.—*In re Thomson*, 8 C. L. R., 106 ; (S. C.) I. L. R., 6 Calc., 523.

A Court of Session has power to direct a Magistrate to inquire into a complaint dismissed by him under this section.—*Proceedings*, 15*th March* 1872, 7 *Mad. H. C. R., Appx., xvi.* See s. 437, *post.*

Where a person made a complaint to the police that the accused had enticed away his wife (a non-cognizable offence), and committed theft (a cognizable offence), the police inquired into the latter offence only, and finding no *primâ facie* case made out, reported to that effect to the Magistrate, who directed that the

 offence should be expunged from the list of offences reported. It was held that, under the circumstances, there had been no dismissal of the complaint in respect of the former offence, and that there was no bar to the complaint as to that offence being taken up and proceeded with.—*Government of Bombay* v. *Shidapa*, I. L. R., 5 Bom., 405.

When a complaint has been dismissed by a Magistrate under this section, no other Magistrate can again entertain the same complaint without an order from some one of the authorities mentioned in s. 437, *infra*; see *Mad. H. C. Pro.*, *28th March* 1878, *Weir*, p. 8. There is no appeal.

A complaint made in the form of a police report may be dismissed without examining witnesses, if the facts stated in the report constitute no offence.—*Mad. H. C. Pro.*, *24th July* 1875, *Weir*, p. 7.

Under s. 437, *infra*, the High Court or Court of Session may direct the District Magistrate, by himself or by any of the Magistrates subordinate to him, to make a further inquiry into any complaint which has been dismissed under this section, or into the case of any accused person who has been discharged.

See notes to ss. 254, 435—438, *infra*.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

Issue of process.

204. If, in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or some other Magistrate having jurisdiction.

Nothing in this section shall be deemed to affect the provisions of section 90.

Act X of 1872, s. 147 (para. 3), s. 148 (para. 1), and s. 149; Act XI of 1874, s. 1; Act IV of 1877, ss. 27, 33, 34, 35.

Fees.—As to fees for processes, see note to s. 68, *ante*.

A complainant's deposition must show some grounds for proceeding before a Magistrate can legally issue a summons (*In re Huronath Roy*, W. R., Sup. Vol., Cr., 33), and the parties charged should not be summoned before the complainant is examined.—*Rujeeb Mundle* v. *Lochan Mundle*, W. R., Sup. Vol., Cr., 37. See also Proceedings, 4 Mad. H. C. R., 163.

The proper officer to issue the warrant is the officer who has heard the complaint made, because it is he who can best exercise a discretion with regard to the *primâ facie* merits of the complaint.—*In re Raghoo Parirah*, 10 B. L. R., Appx., 26; (S. C.) 19 W. R., 28.

It is not a ground for interference by the High Court that a Magistrate has issued a warrant when he should have issued a summons.—*Aneef Putney* v. *Ramsoonder Chuckerbutty*, 1 W. R., Cr., 16.

If a Magistrate issues any process for the purpose of compelling the appearance of an European British subject accused of an offence, such process shall be made returnable before a Magistrate having jurisdiction to inquire into and try the case.—*S.* 445, *infra*.

See s. 90 and notes thereto.

In a warrant case the magistrate can dispense with the personal attendance of the accused a pardanashin lady if he issues a summons in the first instance, and this he has a discretion to do under § 204.

Basumati Adhikarini v.s. Budhram Kalita.
I. L. R. 21 Ca. 588

205. Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

Magistrate may dispense with personal attendance of accused.

But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

This corresponds, with some slight verbal alterations, with s. 151 of Act X of 1872. See, as to the last clause, Act IV of 1877, s. 37.

When the sentence is one of fine only, it may be pronounced in the presence of the accused person's pleader.—*Section* 366, *infra.*

In ordinary summons cases against women alleged to be *purdanashin*, a Magistrate, especially where there is a suggestion that the charge is brought for the purpose of annoyance, will exercise a wise discretion in granting applications to exempt such women from personal attendance in the first instance, or until a *primâ facie* case has been satisfactorily made out. In a case in which certain women alleged to be *purdanashin* women were charged with the abetment of an offence under s. 494 of the Penal Code, and in which an application by them to appear in the first instance by pleader was refused, STRAIGHT, Offg. C. J., said : " In my opinion he (the Magistrate) might well have dispensed with their personal attendance until he had before him some legal and satisfactory evidence indicative of some or all of them having committed a breach of the criminal law, when it would have been time enough to require them to appear.— *In re Rohim Bibi*, I. L. R., 6 All., 59.

As to the right of *pardanashin* women to give their evidence in palkees, see *Rookia Banu* v. *Roberts*, 1 B. L R.., Sh. Notes, X.

Ordinarily no person's appearance should be dispensed with who is charged with an offence not bailable.—*Bom. H. C.Cir.*, 259.

Where the personal attendance of an accused is dispensed with, a recognizance-bond, if such is deemed necessary, should be taken from him, and not from his agent, binding him (the accused) to appear, either in person or by an agent ; and a Magistrate has no legal authority to secure the attendance of an agent by such a bond.—*Reg.* v. *Lallubhai Jassubhai*, 5 Bom. H. C. R., Cr. Cas., 64.

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

206. Any Presidency Magistrate, District Magistrate, Subdivisional Magistrate, Magistrate of the first class or any Magistrate empowered in this behalf by the Local Government may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

Power to commit for trial.

But save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

Act X of 1872, s. 143.

As to European British subjects, see s. 443, *infra.*

It is not illegal for a Magistrate to commit an accused person to the Sessions without examining him or his witnesses.—*Reg.* v. *Hurnath Roy*, 2 W. R., Cr., 50.

Ch. XVIII secs. 207-208

In Bengal, all Magistrates of the second class were invested with power to commit any person to the Court of Session for any offence triable by such Court.—*Calcutta Gazette*, 1873, *Part I*, p. 67.

In Madras, all Magistrates are empowered to commit to the Court of Session.—*Madras Gazette*, 1873, p. 717.

In the Panjab, all Magistrates of the second class were invested, under s. 143 of Act X of 1872, with power to commit for trial.—*Panjab Gazette*, 1873, p. 75.

As to power of a Magistrate of the second class invested with power to commit under this section, see Sched. III, Art. III (7). See *Ram Sundur* v. *Nirotam*, I. L. R., 6 All, 477.

Where a Magistrate without jurisdiction commits an accused to the Sessions Court, the commitment is void, and no reference is necessary to have it set aside.—*Empress* v. *Alim Mundle*, 11 C. L. R., 55. A commitment made with jurisdiction can only be quashed by the High Court.—*S.* 215, *post.*

Procedure in inquiries preparatory to commitment.

207. The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court.

Compare Act X of 1872, s. 189; Act IV of 1877, s. 81.

Taking of evidence produced.

208. The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

Process for production of further evidence.

If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or other thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

The first paragraph of this section corresponds, generally, with s. 190 of Act X of 1872 and s. 82 of Act IV of 1877. The second paragraph embodies powers given by para. 1 of s. 357 and s. 362 of Act X of 1872. See also Act IV of 1877, s. 83, para. 2. See, as to the power of the Court at any stage of any inquiry, trial or other proceeding to summon or examine witnesses, or to examine any person in attendance though not summoned as a witness, or to recall and examine any witness, s. 540, *infra*.

The mere showing to a witness of a summons issued under this section is not sufficient. Either the original should be left with the witness, or should be exhibited to him, and a copy of it delivered or tendered.—*Reg.* v. *Karsanlal Danatram*, 5 Bom. H. C. R., Cr. Cas., 20. See s. 69, *ante*, p. 54. Magistrates may issue summons for service upon witnesses beyond the limits of their district. In the case of warrants, a special procedure is prescribed; see s. 84, *ante*, p. 62; and see 3 Mad. H. C. R., Appx., v.

Rules for examination of complainants and witnesses.—As regards the examination of complainants, witnesses, or persons accused of the commission of

case under S. 147 of the Penal Code to the court of session by a Deputy Magistrate is not necessarily illegal.
Although the case is shewn to be triable only by a Magistrate since the second schedule of the Cr. P. C., there is nothing in sec. 54 of the Cr. P. C. which prevents a Magistrate committing a case under Sec. 147 the I.P.C. to the court of session provided he finds that the accused has committed an offence, which in his opinion cannot be adequately punished by him.

(Queen Empress vs. [illegible] Manick [illegible] 4[illegible] 4[illegible])

any offence under inquiry or trial before a Criminal Court, the following rules should be strictly observed in every case by Magistrates and Sessions Judges :— Ch. XVIII s. 208

(*a.*) Every witness shall be examined *vivâ voce* in open Court.

(*b.*) A Magistrate or Judge shall not be engaged in any other business whilst the examination of a witness is going on, or whilst any documentary evidence is being read.

(*c.*) If, after the examination of a witness has commenced, the Magistrate or Judge is compelled to attend to any other business, the examination of the witness shall be suspended as long as such other business is being attended to.

(*d.*) The examination of a witness shall not be interrupted for the purpose of enabling the Magistrate or Judge to attend to other business unless such business is of an urgent nature.

(*e.*) It shall be the duty of every Appellate Court subordinate to the High Court to examine the memorandum of the evidence made by the subordinate Court, and to report to the High Court cases in which it shall appear that the above rules have not been strictly and properly attended to.

(*f.*) The evidence of every witness shall invariably be recorded in the presence of the officer who may decide the case, except in the cases provided for by ss. 349 and 350 of the Code of Criminal Procedure in which the recalling and re-examination of the witnesses is optional with the superior Magistrates.

(*g.*) After the examination of witnesses has commenced, the trial or preliminary enquiry under Chap. XIII of the Code of Criminal Procedure should be proceeded with until all the witnesses in attendance have been examined, those for the prosecution being first examined; and if any witness be detained for a longer period than two days, the Magistrate should record a memorandum, stating the reasons of such detention.

(*h.*) When it is deemed necessary to adjourn the hearing of a case, the adjournment shall be for as short a time as possible, and no person accused of any offence shall be remanded for any period exceeding fifteen days (s. 344).

(*i.*) Every Sessions Judge and Magistrate shall sit daily and punctually at the hour appointed for the opening of his Court, unless prevented by circumstances which are to be recorded in the proceedings of the Court.—*Calc. H. C. C. O., No.* 6 *of* 16*th May* 1864, *Wilkins*, pp. 6, 7.

Remand.—In *Abdul Kadir Khan's* case, 11 B. L. R., App., 18, it was said the prisoner should be promptly brought before the Magistrate, and the Magistrate has no authority further to detain him in custody, or to remand him to prison, without some reason made manifest to him either in the shape of sworn testimony or in some other form which can be put on the record. The Madras High Court, in the case of *Manikam* v. *Queen*, I. L. R., 6 Mad., 63, concurred in that view. In that case evidence was available, but it appeared necessary to the Magistrate to refer the examination of the witnesses in order that further evidence might be produced, so that the inquiry when commenced might be continuous. The Court held that this reason recorded by the Magistrate, although the facts alleged were not sworn to, justified a remand for five days and a further remand for four days. It is to be borne in mind, however, that an accused person has the right to have the evidence against him recorded as soon as possible, and the fact that there is, or may be, a great body of evidence forthcoming against him is not a ground for a detention for an inordinate period.—*Per* INNES, Offg. C. J. See s. 344, which is as follows :—

If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same, on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody: Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time. Every order made under this section by a Court other than a High Court shall be in writing, signed by the presiding Judge or Magistrate.

Explanation.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand. See note to this section, *post.*

Ch. XVIII s. 209 The general rule in Police prosecutions is, that where an accused person is first brought before a Magistrate and a remand is required by the prosecutor, it is ordinarily sufficient to show by the evidence of a Police-officer that the Police are in possession of information believed to be reliable; that the accused has committed an offence, but when the accused is again brought up after remand, and a further remand is needed, some direct evidence of guilt of the accused should be required by the Magistrate to justify him in refusing bail, and with each remand this necessity for production of evidence of guilt becomes stronger.—*Per* TURNER, C. J., *Ponnusami Chetti* v. *Queen*, I. L. R., 6 Mad., 69. If the offence is bailable, and the accused is prepared to furnish such bail as appears to the Court reasonable, this Code (s. 496, *infra*) directs that he *shall* be released on bail.

Chapter XXV (ss. 353—365) deals with the mode of taking and recording evidence in inquiries and trials. The taking of evidence by Presidency Magistrate is specially provided for by s. 362.

Section 340 provides that every person accused before a Criminal Court may of right be defended by a pleader. The term 'pleader' means a pleader authorized under any law for the time being in force to practice in any Court, and includes (1) An Advocate, a Vakil and an Attorney of a High Court, and (2) any Mukhtar or other person appointed with the permission of the Court to appear in any proceeding in any Court.—*S.* 4 (*r*), *supra*. The law now in force is the Legal Practitioners' Act (XVIII of 1879) as amended by Act IX of 1884.

Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of Police below a rank to be prescribed by the Local Government in this behalf with the previous sanction of the Governor-General in Council; but no person other than the Advocate-General, Standing Counsel, Government Solicitor, Public Prosecutor, or other officer generally or specially empowered by the Local Government in this behalf shall be entitled to do so without such permission. Any person conducting the prosecution may do so personally or by a pleader.—*S.* 495, *infra*. But an officer of Police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.—*Ib.*

Duty of prosecution.—In conducting a prosecution, all the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined.—*Empress* v. *Ram Sahai Lall*, I. L. R., 10 Calc., 1070. In that case the Sessions Judge gave it as a sufficient reason for the non-production of certain witnesses before the Sessions Court that they had been examined by the committing Magistrate against the express wish of the Police-officer in charge of the prosecution. On appeal, however, the High Court thought that was not a valid reason. In the case of *Dhunnoo Kazi*, I. L. R., 8 Calc., 121, WILSON, J., said: "The prosecutor is not free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *primâ facie* his duty accordingly to call those witnesses who prove their connection with the transactions in question, and also must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution. There is no corresponding inference against the accused. He is merely on the defensive, and owes no duty to anyone but himself.—Pp. 124, 125.

When accused person to be discharged.

209. When the evidence referred to in section 208, paragraphs 1 and 2, has been taken, and he has examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, discharge him, unless it appears to

the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly. Ch. XVIII s. 209

Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Compare Act X of 1872, s. 195, para. 1, as amended by Act XI of 1874, s. 14, and Act IV of 1877, s. 87, *infra*.

An order of discharge does not amount to an acquittal for the purposes of s. 403, *infra*.

As to the effect of a discharge, see further *Venu* v. *Coorya Narayan*, I. L. R., 6 Bom., 376.

Examination of accused persons.—In inquiries by Magistrates into cases triable by Courts of Session or High Courts, the Magistrate may, under s. 209, examine the accused "for the purpose of enabling him to explain any circumstances appearing in the evidence against him."

Under this section, also, Magistrates have power, in the trial of warrant-cases, to examine the accused. Similar power is given to the High Courts and Courts of Session by s. 289. It was not, however, intended by the Legislature, in providing for the examination of the accused, that the power should be used as an instrument against the accused for the purpose of obtaining admissions of guilt from him or with a view to supplement the evidence for the prosecution.—*Reg.* v. *Diaz*, 3 Bom., Cr. Cas., 51. The provisions of s. 342 should be carefully borne in mind. That section is as follows:—

"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence. The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the Jury (if any) may draw such inference from such refusal or answers as it thinks just. The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed. No oath shall be administered to the accused."

As to reading the examination of the accused before the Magistrates at the Sessions trial, see s. 287, *post*.

It is not competent to the Court, under s. 342 or ss. 209 or 253, to subject the accused to cross-examination. The discretion given by the law is not to be used for the purpose of driving the accused to make statements criminating himself; but only for the purpose of ascertaining from the accused how he is able to meet facts standing in evidence against him, so that those facts should not stand against him unexplained.—*In re Chinibash Ghose*, 1 C. L. R., 436; *Virabudra Goud*, 1 Mad. H. C. R., 199; *Queen* v. *Bholanath Sein*, 25 W. R., 57; *Queen* v. *Sheik Bazu*, 8 W. R. (F. B.), 47; *Empress* v. *Behari Lall Bose*, 6 C. L. R., 431; *In re Noor Bux Kazi*, I. L. R., 6 Calc., 279; (S. C.) 7 C. L. R., 385; *Pro.*, 1 Mad. H. C. R., 199, *Weir*, p. 42. In the recent case of *In re Hossein Buksh Sheik*, I. L. R., 6 Calc., 96; (S. C.) 6 Calc., 527, PRINSEP, J., said: "In permitting a Sessions Judge to examine an accused person from time to time during a trial, the law does not contemplate that he should commence a trial with a strict examination of a prisoner, in the manner of the cross-examination of an adverse witness by Counsel. . . . By exercising the power allowed by s. 250, the Sessions Court is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some criminating admissions after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge

Ch. XVIII s. 209 to ascertain from time to time from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by the witness, or, after the close of the case, how he can meet what the Judge may consider to be damnatory evidence against him. In one of these cases now before us, we observe that the Judge was engaged, during the whole of the first day, in examining the accused. In like manner, in the second case he examined the accused at considerable length before the case for the prosecution was opened. Such proceedings appear to us to be an abuse of the power given under the law."

A confession recorded by a Magistrate having jurisdiction is to be treated as an examination under s. 342, notwithstanding that the prisoner or prisoners may have been brought before the Magistrate before the conclusion of the police investigation.—*Empress* v. *Anuntram Singh*, I. L. R., 5 Calc., 957.

It is a matter of discretion for the Magistrate himself to judge whether, during the inquiry before him, it is right and proper that the accused should be examined or not, and it is very undesirable that the accused should be examined, when the Magistrate is satisfied that the evidence adduced by the prosecution does not disclose any proper subject of criminal charge against him.—*In re Shama Sankar Biswas*, 1 B. L. R., S. N., xvi.

Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences, none of which were exclusively triable by the Court of Session, and such person was examined as a witness in the case, it was held that, as the tender of pardon was not warranted, he could not be legally examined on oath, and his evidence was inadmissible.—*Empress* v. *Ashgar Ali*, I. L. R., 2 All., 260; and see *Reg.* v. *Hanmanta*, I. L. R., 1 Bom., 610.

The statements made by an accused person at his trial are to be taken down *in extenso* precisely as made, and, if practicable, in the language in which they are made.—*Mad. H. C. Pro.*, *13th May* 1867, *Weir*, p. 43. It is not competent to the Court to refuse to allow the accused to make a statement.—*In re Abdul Guffoor*, 10 C. L. R., 54.

Section 439, *infra*, provides that on examining any record, under s. 435 or otherwise, the High Court or Court of Session may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged.

Under s. 435, the High Court or any Court of Session, or District Magistrate, or any Subdivisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction, for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court. If any Subdivisional Magistrate, acting under that section, considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

The High Court is not debarred from interfering in cases requiring the exercise of discretion, if it appears on the face of the proceedings that the Magistrate has exercised no discretion or has exercised his discretion in a manner wholly unreasonable.—*In re Juggut Chunder Chuckerbutty*, I. L. R., 2 Calc., 110.

In the case of *In re Mohesh Mistree*, I. L. R., 1 Calc., 282; (S. C.) 25 W. R., Cr., 30, 80, it was held under the former Code, dissenting from a decision of the Bombay High Court in the case of *Sidya bin Satya*, referred to in Mr. Justice Prinsep's edition of the Criminal Procedure Code, p. 269, under s. 295 of Act X of 1872, that where a case of improper discharge came before a District Magistrate, the proper and only course for him was to report the case for orders to the High Court, which, if of opinion that the accused was improperly discharged, might, under s. 297, direct a retrial. See *In re Dijobur Dutt*, I. L. R., 4 Calc., 647. Apparently now the procedure, which ought ordinarily to be followed in such a case, is that laid down by the ss. 436, 437, and 438. The Court of Session or District Magistrate would have power, under s. 438, *infra*, to report the case to the High Court.

When, on examining the record of any case under s. 435 or otherwise, the Court of Session or District Magistrate considers that such case is triable exclusively by the Court of Session, and that an accused person has been improperly discharged by the inferior Court, the Court of Session or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Court of Session or District Magistrate, improperly discharged: Provided as follows— Ch. XVIII s. 209

(*a*) that the accused has had an opportunity of showing cause to such Court or Magistrate why the commitment should not be made:

(*b*) that, if such Court or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Court or Magistrate may direct the inferior Court to inquire into such offence.—*S.* 436

Where a Magistrate of the first class discharged under this section a person who was charged with an offence exclusively triable by the Court of Sessions, and the District Magistrate directed him, under s. 436, to commit the accused to the Court of Sessions, and a commitment was made, but the Sessions Judge, under s. 215, referred the case for orders to the High Court, the commitment was held to be good.—*Empress* v. *Pirya Gopal*, I. L. R., 9 Bom., 100.

A charge of assault and theft should not be dismissed for default of the complainant's attendance.—*Reg.* v. *Jodhoo Paharee*, 1 W. R., Cr., 25.

Where an accused who has been duly summoned or arrested under a warrant is present to meet any charge, and no evidence is forthcoming against him, if it be not shown to the Magistrate that the case is one in which he ought to adjourn the inquiry under the preceding section, the Magistrate is not only authorized, but he is empowered, and, in fact, required, to discharge such accused person.—*Tuky Mahomed Mundul* v. *Kisto Nath Roy*, 15 W. R., Cr., 53.

The following instructions as to cases where death has ensued, but it is doubtful whether the offence of culpable homicide has been committed, have been issued by the Calcutta High Court:—In cases where death appears to have resulted from injuries voluntarily inflicted by the party accused, Magistrates ought to be very careful not to take it upon themselves to absolve the accused from the graver charge, and convict of hurt or grievous hurt only, unless they are quite clear that there is no sufficient evidence to warrant a commitment to the Sessions for murder, or culpable homicide not amounting to murder.—*Calc. H. C. C. O., No. 9 of 6th September* 1869, *Wilkins*, p. 112.

In a trial before a Deputy Commissioner invested with special powers under s. 30, the accused was charged with culpable homicide not amounting to murder under s. 304 of the Indian Penal Code, and there was some evidence, which would, if believed, have supported a charge of murder, but the Court did not consider that evidence sufficiently strong to warrant such a charge, and proceeded to try the case as upon a charge under s. 304 of the Indian Penal Code only—a charge which the Deputy Commissioner was empowered to try. The Court said: "Section 209 empowers a Magistrate holding an inquiry to try the case himself, if he thinks that only an offence within his jurisdiction has been committed. This is the view which we understand the Deputy Commissioner has taken, and we cannot therefore hold that it was not authorized by law, or that he had acted without jurisdiction, merely because there is some evidence which, if believed, would substantiate the charge of murder, an offence beyond his jurisdiction. At the same time we think this course should very rarely, if ever, be taken by an officer invested with special powers under ss. 30 and 34 of the Criminal Procedure Code, and that in adopting it, any such officer incurs a very grave responsibility."—*Empress* v. *Parmanund*, 13 C. L. R., 375; (S. C.) I. L. R., 10 Calc., 85.

So, in the case of *Luchman* v. *Juala*, I. L. R., 5 All., 161, MAHMOOD, J., held, that a Magistrate inquiring into a case exclusively triable by the Court of Session is not bound to commit the accused for trial where the evidence for the prosecution, if believed, would end in a conviction, but that he is competent, if he discredit such evidence, to discharge the accused. The High Court would only interfere under s. 437 in such a case, if it came to the conclusion that the Magistrate had illegally and improperly underrated the value of evidence.—*Puran Telee* v. *Bhuthoo Dhome*, 9 W. R., Cr., 5.

Ch. XVIII s. 210

210. When, upon such evidence being taken and such examination (if any) being made, the Magistrate finds that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

When charge is to be framed.

As soon as the charge has been framed, it should be read and explained to the accused and a copy thereof shall, if he so requires, be given to him free of cost.

Charge to be explained, and copy furnished to accused.

The first paragraph of this section embodies the provisions of s. 195, expl. iii, and ss. 196 and 198, para. 1, of Act X of 1872; see also Act IV of 1877, ss. 88 and 89, omitting paras. 3 and 4 of the last-named section. The last paragraph of the section corresponds with s. 199 of Act X of 1872; see also Act X of 1875, s. 13, and Act IV of 1877, s. 90.

The duty of a committing officer is to ascertain whether, by the evidence for the prosecution, a *primâ facie* case has been made out against the accused.—*Reg.* v. *Maha Singh*, 3 All., 27.

It was held by SARGENT, C. J., and BAYLEY, J. (SCOTT, J., *dissentiente*), that in the Code generally the word "charge" is used as a statement of a specific offence and not as indicating the entire series of offences of which a prisoner is accused. —*Queen* v. *Appa Subhana Mendre*, I. L. R., 8 Bom., 200. In Form No. 28 in the second Schedule, the term is undoubtedly used as containing several heads of offences, but the Court was of opinion, in the case quoted, that that exception could not outweigh the conclusion to be drawn from the body of the Code itself. See further upon this point, ss. 221, 226, and 227.

Section 347, *post*, provides: —"If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall stop further proceedings, and commit the accused under the provisions hereinbefore contained. If such Magistrate is not empowered to commit for trial, he shall proceed under s. 346."

In framing alternative charges of giving false evidence, the charges must show clearly the statements alleged to be false; see *Cir. Or. No.* 3 *of* 1866, 5 W. R., Cr. Cir., p. 2; *Reg.* v. *Soonder Mohooree*, 5 Wym. Cr. Rul., 33. See ss. 221 and 223, *illustration* (*b*).

When there has been a riot and fight between two parties, the members of each should be tried separately, and it is wrong to commit the members of both parties for trial together upon joint charges as if they had had one common object.—*Queen* v. *Sheikh Bazu*, 8 W. R., Cr., 47; (S. C.) 4 Wym. Cr. Rul. (F. B.), 13; *Queen* v. *Durzoolla*, 9 W. R., Cr., 33.

Two or more prisoners committing acts of perjury on different occasions ought not to be tried on one charge. Where two prisoners were alleged to have given false evidence in a case, and were tried on one charge, it was said that the circumstance that the evidence related in both cases to the same subject-matter, or even that the false statements were similar, made no difference in principle.—*Calc. H. C. C. L.*, 20*th July* 1868, 2 W. R., C. L., 21. See *Empress* v. *Niaz Ali*, I. L. R., 5 Alla., 17, which has been overruled by *Empress* v. *Ghulet*, I. L. R., 7 All., 44. See *Empress* v. *Ramji Sajabarao*, I. L. R., 10 Bom., 124.

Some of several persons implicated in the commission of the same offence should not be tried by the Magistrate, whilst others are committed to the Sessions.— When several persons are accused of the commission of the same offence, it would be obviously inconvenient, if a Magistrate were to punish some and commit others to a Court of Session; and as the Code does not seem to contemplate such procedure, the Magistrate should, if he considers the case to be one for the Sessions, commit all those concerned for trial before that tribunal.—*Calc. H. C. C. O., No.* 100 *of* 27*th May* 1862, *Wilkins*, p. 108.

Chapter XIX (ss. 221—240) deals with the form, joinder, and withdrawal of charges. A number of forms of charges will be found in Schedule V, XXVIII, *post.* As to the persons who may be charged jointly, see s. 239 and the note thereto. As to trial of a European British subject accused jointly with Native, see ss. 214 and 452. Where any question arises as to the sanity of an accused person, recourse must be had to Chap. XXXIV, *post.*

When a commitment is made, the Magistrate should notify the fact, and transmit the following papers to the Court of Session:—

(*a*) a copy of the charge;
(*b*) calendar;
(*c*) reasons for commitment;
(*d*) record of original inquiry.

Besides these, any weapons or other articles of property necessary to be produced in evidence must be sent, or be forthcoming at the trial.—*Smyth*, p. 95.

List of witnesses for defence on trial.

211. The accused shall be required at once to give in orally or in writing a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

Further list.

The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

Act X of 1872, s. 200, paras. 1 and 3; Act IV of 1877, s. 91.

It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case, and he ought not to determine beforehand what credit he will give to their evidence (*In the matter of Mohima Chandra Shah*, 6 B. L. R., Appx., 78); and the refusal to summon witnesses cited by the accused on the ground of their being implicated in the charge, vitiates the trial and conviction. —*Ram Shuhai Chowdhry* v. *Sanker Bahadur*, 6 B. L. R., Appx., 65.

When a prisoner gives in a list of the witnesses he wishes to summon after his case has been committed, the Magistrate is bound to exercise his discretion upon the point, and to state whether he will summon the witnesses or not, and he ought to state his reasons for not doing so. If he thinks the witnesses were included for the purpose of delay, he should proceed under s. 217, *infra*. See *Reg*. v. *Rajcoomar Mookerjee*, 16 W. R., Cr., 14.

There is no reason to refuse an application for summons simply because a large number of witnesses is mentioned therein.—*Hurendra Narain Singh Chowdhry* v. *Bhobani Prea Baruani*, I. L. R., 11 Calc., 762, p. 766.

Section 231 provides that whenever a charge is altered by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or resummon, and examine, with reference to such alteration, any witness who may have been examined; and s. 291, that the accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in ss. 211 and 231, be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

So, a prisoner is entitled, as a matter of right, to have any witnesses named in the list which he delivers to the Magistrate summoned and examined (*Queen* v. *Prosunno Coomar Moitro*, 23 W. R., Cr., 56; *Queen* v. *Bhooban Isher Gosamee*, 2 W. R., Cr., 6; *Queen* v. *Abdool Setar*, 3 W. R., Cr., 36); but he is not entitled as of right to have witnesses not named by him before the Magistrate summoned at the Sessions trial.—*Queen* v. *Boidnath Singh*, 3 W. R., 29.

Ch. XVIII secs. 212-213

A Magistrate is at liberty, under s. 216, to decline to summon the persons named on the list when the prisoner declines to satisfy him that they are material witnesses, but he ought to fix the amount which he considers necessary to defray the cost of the attendance of the persons named, and intimate to the prisoner his readiness to issue summonses on that amount being deposited.—*In re Subharaya Mudali*, 4 Mad. H. C. R., 81.

The following rule for regulating the practice of the subordinate Courts has been promulgated by the Judicial Commissioner of British Burmah :—Whenever an accused person is committed for trial before the Court of Session or High Court, the Magistrate shall, after the charge has been read and explained to the accused person, require him to give in a list of witnesses as provided in s. 200 of the Code of Criminal Procedure (Act X of 1872) (see ss. 211, 212, and 213 of this Code), and the Magistrate shall record the fact of such requirement having been made, and shall record the list of witnesses, if any, so named; and also the names of such witnesses as, under s. 359 of the said Code (s. 216 of this Code), he may decline to summon and the reason for refusal. Such record shall, with the other proceedings, be sent to the Court to which the accused person has been committed for trial.—*Burmah Gazette*, 1878, p. 139.

See ss. 231 and 291, *post*, as to the right of the accused to have witnesses summoned.

Power of Magistrate to examine such witnesses.

212. The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under section 211.

Act X of 1872, s. 200, first part of para. 2; Act IV of 1877, s. 91. See s. 216, *infra*.

Order of commitment.

213. When the accused, on being required to give in a list under section 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

Compare Act X of 1872, s. 198, para. 1, and s. 200, para 2; and Act IV of 1877, s. 89, para. 1, and s. 91.

The signature of the Magistrate to a warrant of commitment should not be affixed by a stamp.—*Subramanya* v. *Ayyar*, I. L. R., 6 Mad., 396.

By C. O. No. 8 of 18th August 1882, all judicial officers were reminded that in case of all documents which are required by law to be signed, the impression of a stamp having the officer's name is insufficient and illegal.—*Wilkins*, pp. 119, 120.

Where a Magistrate, after examining four witnesses for the prosecution, discharged the accused, but subsequently, on becoming aware that there was a fifth witness present, the Magistrate cancelled his order of discharge, took further evidence, and committed the accused for trial to the Court of Session, it was held, that the commitment was good.—*7 Mad. H. C. R., Appx., xl.*

In preparing 'the reasons for commitment,' the committing Magistrate should marshal the evidence in the order in which it should come under judicial consideration—

(*a*) the medical evidence, if any ;

(*b*) evidence of the identity of the body or property, and the direct evidence of the preparation of the crime;

(c) evidence to the discovery of the offender and his arrest;
(d) circumstantial and other evidence.
—*Smyth*, p. 95.

A commitment once made can be quashed by the High Court only, and only on a point of law.—*S.* 215, *post.*

The duty of a committing officer is to ascertain whether, by the evidence for the prosecution, a *primâ facie* case has been made out against the accused.—*Reg.* v. *Maha Singh*, 3 All., 27.

In framing alternative charges of giving false evidence, the charges must show clearly the statements alleged to be false: see *Cir. Or. No.* 3 *of* 1866, 5 W. R., Cr. Cir., p. 2; *Reg.* v. *Soonder Mohooree*, 5 Wym. Cr. Rul., 33. See *Empress* v. *Ghulet*, I. L. R., 7 All, 44.

When there has been a riot and fight between two parties, the members of each should be tried separately, and it is wrong to commit the members of both parties for trial together upon joint charges as if they had had one common object.—*Queen* v. *Sheikh Bazu*, 8 W. R., Cr., 47; (S. C.) 4 Wym. Cr. Rul. (F. B.), 13; *Queen* v. *Durzoollah*, 9 W. R., Cr., 33.

In prosecutions for giving false evidence under s. 193 of the Penal Code, it was held, the case of each person accused should be separately inquired into and, if committed for trial, tried separately. It is wholly erroneous to include them in one joint charge.—*Empress* v. *Niaz Ali*, I. L. R., 5 All., 17, overruled on another point by *Empress* v. *Ghulet*, I. L. R., 7 All., 44; see *Reg.* v. *Zameerun*, 6 W. R., Cr. (F. B.), 65; *Reg.* v. *Mahomed Hoomayoon Shaw*, 13 B. L. R., 324.

So, in Calcutta it was laid down that two or more prisoners committing acts of perjury on different occasions ought not to be tried on one charge. Where two prisoners were alleged to have given false evidence in a case, and were tried on one charge, it was said that the circumstance that the evidence related in both cases to the same subject-matter, or even that the false statements were similar, made no difference in principle.—*Calc. H. C. C. L.*, 20*th July* 1868, 2 W. R., C. L., 2.

When several persons are accused of the commission of the same offence, it would be obviously inconvenient if a Magistrate were to punish some and commit others to a Court of Session; and as the Code does not seem to contemplate such procedure, the Magistrate should, if he considers the case to be one for the Sessions, commit all those concerned for trial before that tribunal.—*Calc. H. C. O., No.* 100 *of* 27*th May*, 1862, *Wilkins*, p. 108.

See note to s. 210, *supra.*

Person charged outside Presidency-towns jointly with European British subject.

214. If any person (not being an European British subject) is accused before a Magistrate other than a Presidency Magistrate of having committed an offence conjointly with an European British subject who is about to be committed for trial, or to be tried before High Court on a similar charge arising out of the same transaction, and the Magistrate finds that there are sufficient grounds for committing the accused for trial, he shall commit him for trial before the High Court, and not before the Court of Session.

Act X of 1872, s. 197, omitting the explanation.

Quashing commitments under section 213 or 214.

215. A commitment once made under section 213 or section 214 by a competent Magistrate can be quashed by the High Court only, and only on a point of law.

Act X of 1872, s. 197, explanation, and last paragraph. As to what Magistrates are empowered to commit, see s. 206 and note thereto. Under s. 532, *infra*,

Ch. XVIII s. 216

a commitment made by a Magistrate not duly empowered may be accepted by the Court to which the commitment has been made, if the accused has not been prejudiced. See *Empress* v. *Pirya Gopal*, I. L. R., 9 Bom., 100; *Empress* v. *Lachman Singh*, I. L. R., 2 All., 398.

In the case of *Alim Mandle*, 11 C. L. R., 55, a commitment made by a Magistrate without jurisdiction was held to be void, and it was therefore considered that it was not necessary to refer the matter to the High Court to have it set aside.

In the case of *Queen* v. *Kanjamalai Padayachi*, I. L. R., 6 Mad., 572, an accused person had been discharged by a Subordinate Magistrate, and the District Magistrate directed the committal of the accused to the Court of Sessions under s. 436, *post*, without calling upon him to show cause why he should not be committed. The High Court set aside the order of committal, and the commitment made thereunder as illegal. Want of evidence is sufficient ground for quashing a commitment. —*Empress* v. *Narotam Das*, I. L. R., 6 All., 98.

Where an accused was committed by a Magistrate of the first class for trial by the Sessions Court, on a charge of having given false evidence in a judicial proceeding before the Sessions Judge, there being no Assistant Sessions Judge or Joint Sessions Judge, it was held, that the commitment could not be quashed, there being no error in law, and that the case must, therefore, be transferred for trial to another Court of Session. But in such a case the better course would be for the Magistrate to try the case himself, and if he is incompetent to pass a sufficient sentence, for the Sessions Judge to refer the case to the High Court for enhancement of sentence.—*Reg.* v. *Gaji Kom Ranee*, I. L. R., 1 Bom., 311. See *Empress* v. *Jangibir*, I. L. R., 4 All., 150.

Where a Magistrate, after examining four witnesses for the prosecution, discharged the accused, but subsequently, on becoming aware that there was a fifth witness present, cancelled his order of discharge, took further evidence, and committed the accused for trial to the Court of Session,—it was held, that the commitment was good.—*7 Mad. H. C. R., Appx., xl.*

Summons to witnesses for defence when accused is committed.

216. When the accused has given in any list of witnesses under section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list as have not appeared before himself, to appear before the Court to which the accused has been committed:

Provided that where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly:

Refusal to summon unnecessary witness unless deposit made.

Provided also that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may, before summoning him, require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness.

The first paragraph of this section corresponds with s. 358 of Act X of 1872; as to the second, compare s. 92 of Act IV of 1877; and as to the third, see s. 359 of Act X of 1872. Ch. XVIII s. 217

As to process for compelling the production of evidence on the trial of warrant-cases at the instance of the accused, see s. 257, *infra*.

See notes to s. 291, *infra*.

In the case of *Empress* v. *Rajcoomar Singh*, I. L. R., 3 Calc., 573; (S.C.) 2 C. L. R., 62, the following remarks were made by JACKSON, J.:—"I understand s. 359 (of Act X of 1872) to mean that if, among the persons named by the accused as witnesses to a defence, the Magistrate considers that any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment and inquire whether the witness is material. I have never heard it was intended by that provision to enable the Magistrate to inquire generally into what the defence of the accused is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused."

A Magistrate is at liberty, under this section, to decline to summon the persons named on the list when the prisoner declines to satisfy him that they are material witnesses, but he ought to fix the amount which he considers necessary to defray the cost of the attendance of the persons named, and intimate to the prisoner his readiness to issue summonses on that amount being deposited.—*In re Subharaya Mudali*, 4 Mad. H. C. R., 81.

A Magistrate is not at liberty to refuse to summon a witness tendered by an accused person, except upon the grounds specified in this section. If he does refuse, he must proceed under the section.—*In re Deela Mahton* v. *Sheo Dyal Koeri*, I. L. R., 6 Calc., 714. The fact that the accused had, at the close of his case, stated that he did not wish to call the witnesses whom he afterwards tendered, is no reason for refusing to summon them to meet fresh evidence taken by the Magistrate.—*Ibid.*

In warrant-cases, if the accused applies to the Magistrate to issue any process for compelling the attendance of any witness (whether he has or has not been previously examined in the case) for the purposes of examination or cross-examination or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice. Such ground shall be recorded by him in writing. The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.—*S.* 257, *post.*

When the Magistrate has ordered a summons to issue for the attendance of a witness for the defence, and the witness does attend after due service of the summons, the Magistrate cannot refuse to issue a fresh summons on the ground that there has been some delay in the service of the summons.—*Empress* v. *Ruknuddin*, I. L. R., 4 All., 53. In such a case s. 257 was held not to apply.—*Ibid.*

Under s. 231, *post*, whenever a charge is altered by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or resummon, and examine, with reference to such alteration, any witness who may have been examined; and s. 271 provides that, in trials before High Courts and Sessions Courts, the accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in ss. 211 and 231, be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

Bond of complainants and witnesses.

217. Complainants and witnesses for the prosecution and defence, whose attendance before the Court of Session or High Court is necessary, and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attend-

Ch. XVIII s. 218

ance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be.

Detention in custody in case of refusal to attend or to execute bond.

If any complainant or witness refuses to attend before the Court of Session or High Court, or to execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may be.

Act X of 1872, s. 360; Act IV of 1877, s. 93.

Prosecutors and witnesses should be 'bound over to appear' at the next Criminal Sessions commencing on . . . .

It will be the duty of the Magistrate, in order to prevent hardship and unnecessary detention to such person, so to arrange the coming on of cases before the Court of Session, that such parties may not be brought from their homes to the Sudder Station before they are actually required, and that they should have written notice of the specific date on which their attendance will be necessary, and it should be carefully explained that failure to attend will be severely dealt with.—*Wilkins*, p. 111.

Commitment when to be notified.

218. When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the Local Government in this behalf, notifying the commitment and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge;

Charge, &c., to be forwarded to High Court or Court of Session.

and shall send the charge, the record of the inquiry, and any weapon or other thing which is to be produced in evidence, to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in this behalf by the High Court.

English translation to be forwarded to High Court.

When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

As to the first clause, compare Act X of 1872, s. 202, para. 1, as amended by Act XI of 1874, s. 15; and as to the second and third clauses, Act X of 1872, s. 198, paras. 2, 3, and 4.

For form of notice of commitment by Magistrate to Government Pleader, see Sched. V, No. 27.

When a commitment is made to the Court of Session, the record of the Magistrate is to include—

First—the proceeding by which the case is originated in the Magistrate's Court.

Secondly—all papers showing the steps taken under the authority of the Magistrate upon the complaint; the summons, if any, and its return; the warrant and the return, or other documents showing how and when it has been executed; also any search-warrant, and the report showing how it has been executed;

Thirdly—the report, if any, on such inquiry as that under ss. 174 and 202; Ch. XVIII s. 218
Fourthly—the orders, if any, sanctioning the prosecution, when such sanction is necessary;

Fifthly—the order, if any, withdrawing the case from one Court or transferring it to another Court. The papers on the record of the Magistrate are not evidence in the Court of Session either for or against the accused, except so far as they are formally put in at the trial and accepted by the Court as evidence.—*Calc. H. C. C. O., No.* 1 *of* 23*rd January* 1872, *Wilkins*, p. 109.

The following further directions for guidance of Magistrates in making commitments to the Court of Session have been published by the Calcutta High Court:

(*a.*) Whenever a case is committed to the Court of Session, the names of the witnesses shall be entered on the back of the copy of the charge which has to be forwarded to that Court under s. 198 (s. 218) of the Code of the Criminal Procedure. This copy shall be placed by the Sessions Judge at the beginning of the record of the trial in his Court.

(*b.*) The observations or judgment of the Magistrate in committing the prisoner shall always go up in original with the record, and they, with the original depositions, should be read by the Judge before the trial. Abstracts of the evidence are considered unnecessary, and they are at times misleading.

(*c.*) Magistrates should be careful to arrange their commitments with a view to the trials taking place at the earliest or next ensuing Sessions in order to avoid the needless detention of accused persons for prolonged periods.

(*d.*) Whenever a commitment is made, intimation shall be immediately given to the Court of Session, through the Magistrate of the District, by a letter in the following form:—

FROM

THE MAGISTRATE OF

TO

THE SESSIONS JUDGE OF

SIR,—I beg to report that I have this day committed, to take his trial before the Court of Session, the person named in the margin, on the charge specified below.

I have, &c.,
A. B.,
Magistrate (*as the case may be*).

(*Charges should follow here.*)

(*e.*) It will be unnecessary for the Court of Session to send any answer fixing a date for the trial, but the Judge will be guided by the information which he thus receives in estimating the time which it will be necessary to devote to the Criminal Sessions, and consequently at what period he will be able to take up civil business thereafter.

(*f.*) Prosecutors and witnesses should be bound over to appear "at the next Criminal Sessions commencing on ."

(*g.*) It will be the duty of the Magistrate, in order to prevent hardship and unnecessary detention to such persons, so to arrange the coming on of cases before the Court of Session that such parties may not be brought from their homes to the Sudder Station before they are actually required, and that they should have written notice of the specific date on which their attendance will be necessary, and it should be carefully explained that failure to attend will be severely dealt with.

(*h.*) The directions herein contained for committing Magistrates are to be observed, so far as they are applicable, by Civil Courts and other authorities committing persons for trial at the sessions.

(*i.*) At each periodical sessions all persons awaiting trial shall be brought before the Judge in open Court; and, if the Government Prosecutor is not prepared to go to trial in any particular case, he should be required to show cause, properly supported, why the accused should not be acquitted and released, the accused himself being also heard in answer to such cause shown.

(*j.*) Sessions Judges are reminded that trials must not be too lightly postponed. It cannot be too often pointed out that a further detention of an accused

Ch. XIX — 219-220 person in jail for perhaps two months is in itself no trivial infliction, and is only justified when there is apparently a good case against the prisoner, and when the Judge is satisfied that, for the ends of justice, it is necessary to postpone the trial.—*Calc. H. C. C. O., No. 5 of 14th October* 1879, *Wilkins*, pp. 101—3.

219. The Magistrate may summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

Power to summon supplementary witnesses.

Such examination shall, if possible, be taken in the presence of the accused, and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall, if the accused so require, be given to him free of cost.

Act X of 1872, s. 357, para. 2; Act IV of 1877, s. 91, para. 4.

Under s. 548, any person affected by a judgment or order passed by a Criminal Court is entitled to have a copy of the Judge's charge to the jury, or of any order or deposition or other part of the record, on payment for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost.

220. Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused, by warrant, to custody.

Custody of accused pending trial.

Compare Act X of 1875, s. 26, and Act IV of 1877, s. 91, para. 4.

As to bail, see Chap. XL, and as to place of imprisonment, see s. 541, *infra*.

CHAPTER XIX.

OF THE CHARGE.

Form of Charges.

In the recent case of *Queen* v. *Appa Subhana Mendre*, I. L. R., 8 Bom., 200, the question as to the meaning of the term 'charge,' as used in the Code, was discussed upon a case reserved by SCOTT, J., under s. 434 of the Code. SARGENT, C. J., and BAYLEY, J., held, that the term is used throughout the Code except in Form 28, Sched. II, as meaning the statement of a specific offence, and not as indicating the entire series of offences of which a prisoner is accused. SCOTT, J., dissented. He was of opinion that the term was used both as indicating the whole series of *counts* or heads of charge, and, also, as indicating a charge of one specific offence; and that in s. 227, *post*, it was used in the former sense. See further notes to ss. 226, 227, 228, 236, and 237.

Mr. Justice Stephen, the framer of the Code of 1872, in his History of Criminal Law, Vol. III, p. 337, says, in a note on ss. 221, 240 of the present Code: "I drew these sections in the Code of 1872. They are re-enacted with little alteration." And then he goes on to say: "The provisions relating to 'charges' are intended to provide that 'the charge' shall give the accused full notice of the offence charged against him, but that the only result of any defect in the charge shall be an amendment in terms as to delay or a new trial, if the accused seems to have been misled."

It is quite clear from this passage, SCOTT, J., considered, that the intention of the Legislature was to permit all amendments which would not prejudice the prisoner in his defence. In other words, prejudice to the prisoner was intended for the

future to be the test of admissibility or rejection of proposed amendments.—*Queen* v. *Subhana Mendre*, I. L. R., 8 Bom., 213.

Charge to state offence.

221. Every charge under this Code shall state the offence with which the accused is charged.

Specific name of offence sufficient description.

If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name.

If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

What implied in charge.

The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

Language of charge.

In the Presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

Previous conviction when to be set out.

If the accused has been previously convicted of any offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to award, the fact, date, and place of the previous conviction shall be stated in the charge. If such statement is omitted, the Court may add it at any time before sentence is passed.

Illustrations.

(*a.*) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in ss. 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to s. 300, or that, if it did fall within exception 1, one or other of the three provisos to that exception applied to it.

(*b.*) A is charged, under s. 326 of the Indian Penal Code, with voluntarily causing grievous hurt to B, by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by s. 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(*c.*) A is accused of murder, cheating, theft, extortion, adultery, or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

Ch. XIX s. 222

(*d.*) A is charged, under s. 184 of the Indian Penal Code, with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

Compare Act X of 1872, s. 439, and Act IV of 1877, s. 94. Similar provisions to those contained in the last paragraph were contained in s. 118 of Act X of 1875.

Para. 2 and illustration (*c*)—Read in connection with s. 223, illustration (*b*).

Para. 5—Compare s. 105 of the Evidence Act (I of 1872), which provides:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations.

"(*a.*) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.

"(*b.*) A, accused of murder, alleges that, by grave and suddenprovocation, he was deprived of the power of self-control. The burden of proof is on A.

"(*c.*) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by s. 335, voluntarily causes grievous hurt, shall be subject to certain punishments. A is charged with voluntarily causing grievous hurt under s. 325. The burden of proving the circumstances bringing the case under s. 335 lies on A."

Para. 7—As to proving previous convictions, see s. 310.

If it is intended to prove a previous conviction against an accused person for the purpose of enhancing the punishment, it is necessary to state the fact of that previous conviction in the charge. If it is omitted, it may be added to the charge at any time previous to the sentence being passed, but not after.—*Queen* v. *Rajcoomar Bose*, 19 W. R., Cr., 41: and see *Queen* v. *Esan Chunder Dey*, 21 W. R., Cr., 40. As to cases in which the accused is liable under the Whipping Act, see *Badiya* v. *Queen*, I. L. R., 5 Mad., 158; and Mad. H. C. Cir. Order, No. 2686, dated 20th Dec., 1881. A statement in a Court that, at the time when the prisoner committed the offence, he had been previously convicted of offences punishable under the Indian Penal Code, is not a sufficient compliance with the provisions of this paragraph.—*Queen* v. *Sheik Jakir*, 22 W. R., Cr., 39.

The previous conviction should form the subject of a separate head of the charge, and to this the accused person should only be required to plead if he has been convicted of the offence for which he has been under trial. If he admits the previous conviction, that will suffice; but if he denies it, it should be proved by recording the finding in the previous case and the evidence of the jailor or other person as to the identity of the accused with the person previously convicted.—*Bom. H. C. Cir.*, 44; see also *Mad. H. C. Pro.*, 23*rd Sept.* 1878, *Weir*, p. 4.

For form of charges, see Sched. V, No. XXVIII.

In charging a previous conviction, the charge should run—

"That you, , before the committing of the said offence, were committed on the day , in Calendar No. of , on the file of the , of an offence punishable, under Chapter of the Penal Code, with imprisonment for a term of three years, to wit the offence of , which conviction is still in full force and effect, and that you are thereby liable to enhanced punishment under s. 75 of the Indian Penal Code and within the cognizance of ."
—*Mad. H. C. Pro.*, 17*th April* 1868, *Weir*, p. 4.

Particulars as to time, place, and person.

222. The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

Act X of 1872, s. 440; Act IV of 1877, s. 95.

In the case of *Behari Mahton* v. *Empress*, I. L. R., 11 Calc., 106, where the foundation of the charges lay in the fact that the accused was alleged to have been a member of an unlawful assembly, the Court (MITTER and NORRIS, JJ.) said: "An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him. Unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate an accused person for acts not committed by himself but by others with whom he is in company."

So, in the case of *Empress* v. *Khairati*, I. L. R., 6 All., 204, where a person was tried for an unnatural offence and convicted on a charge which did not allege the time when, place where, or point to any known or unknown person with whom the offence was committed, and without any proof of these particulars, the facts proved against him only being that he habitually wore women's clothes, exhibited physical signs of having committed the offence,—it was held that the conviction was not sustainable. See the remarks of STRAIGHT, J., p. 207.

When manner of committing offence must be stated.

223. When the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

Illustrations.

(*a*.) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(*b*.) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(*c*.) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(*d*.) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(*e*.) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(*f*.) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

Act X of 1872, s. 441; Act IV of 1877, s. 96. See remarks of STRAIGHT, J., in the case of *Empress* v. *Khairati*, I. L. R., 6 All., 204.

Words in charge taken in sense of law under which offence is punishable.

224. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

Act XVIII of 1862, s. 28.

In the case of *Empress* v. *Baban Khan*, I. L. R., 2 Bom., 142, it was held, that when an accused person has been convicted on a charge expressed in vague terms, the prosecution, on appeal, should be limited to the particular sense in which the charge was understood at the trial.

Effect of errors.

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those

Ch. XIX s. 225 particulars, shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission.

Illustrations.

(*a.*) A is charged, under s. 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word 'fraudulently' being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(*b.*) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(*c.*) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in this case, a material error.

(*d.*) A is charged with the murder of Khoda Baksh on the 21st January 1882. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(*e.*) A was charged with murdering Haidar Baksh on the 20th January 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

Act X of 1872, s. 443; Act X of 1875, s. 24; Act IV of 1877, s. 98.

The term 'charge' is used, it was held by SARGENT, C. J., and BAYLEY, J., as the statement of a specific offence, and not as indicating the entire series of offences of which a prisoner is accused. SCOTT, J., dissented. He was of opinion that, in s. 227, it was used as indicating the whole series of counts or heads of charge.—*Empress* v. *Appa Subhana Mendre*, I. L. R., 8 Bom., 200.

Section 537 provides that, subject to the provisions hereinbefore contained, no finding, sentence, or order passed by a Court of competent jurisdiction shall be reversed or altered under Chap. XXVII or on appeal or revision, on account of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial, or in any inquiry or other proceeding under this Code, or of the want of any sanction required by s. 195, or of the omission to revise any list of jurors or assessors in accordance with s. 324, or of any misdirection in any charge to a jury; unless such error, omission, irregularity, want or misdirection has occasioned a failure of justice.

In the case of *Empress* v. *Ramji Sajabarao*, I. L. R., 10 Bom., 124, the accused was charged, in the alternative, by the trying Magistrate as follows:—"That you, on or about the 13th day of October 1882, at Nandarpada, stated that you had seen V. and M. carrying teakwood from Gohe Forest, to Narayan Ram Chandra, Range Forest Officer and on 14th February; 1885, you stated on oath before the first class Magistrate at Pen, at the trial of these persons, that you did not see where they had brought the wood from, and thereby committed an offence punishable under s. 182 or s. 193 of the Indian Penal Code." At the trial the accused asserted the truth of the former of these two statements, and denied having made the other. The Magistrate was unable to find which of them was false, and convicted the accused, in the alternative, either under s. 182 or s. 193 of the Indian Penal Code. It was held that the charge was bad in law, being an alternative charge in a form forbidden by s. 233 of the Criminal Procedure Code, which directs that, for every distinct offence of which any person is charged, there shall be a separate

charge. It was also held, that the accused could not be tried upon a charge framed in the alternative as in the form given in Sched. V, XXVIII (4), of the Criminal Procedure Code, as, upon the facts alleged, there was no way of charging him with one distinct offence on the ground of self-contradiction. He could not successfully be charged under s. 193 of the Penal Code on contradictory statements, because he only made one deposition, in which there were no discrepancies; and, similarly, he could not be charged under s. 182 of the Penal Code, for he only once gave information to a public servant. It was held, also, that, having regard to ss. 225, 232, and 537 of the Criminal Procedure Code (X of 1882), the accused, convicted upon such a charge, must be held to have been misled in his defence, and his conviction and sentence were reversed.

Procedure on commitment without charge or with imperfect charge.

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown, may frame a charge, or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges.

Act X of 1872, s. 446; Act X of 1875, ss. 7, 8.

The words "without a charge" in this section properly apply not only to a case in which there is no charge at all, but also to a case in which there is no charge of such offence as the Sessions Judge or Clerk of the Crown may think the prisoner ought to be tried for.—*Empress* v. *Appa Subhana Mendre*, I. L. R., 8 Bom., 200. In that case, A was tried at the Criminal Sessions of the High Court on a charge (1) of murder, (2) of abetting B to commit such murder. The jury, having considered their verdict, were asked by the Clerk of the Crown if they were agreed. The foreman replied that they were, and that their verdict was "guilty;" and, when further asked, he said, "guilty of abetment—abetment generally." On the application of Counsel for the prosecution, a charge was then added of "abetment of murder committed by some person or persons unknown." The additional charge was then read aloud to the jury, but was not specially explained to the prisoner, nor was he called upon to plead to it. Counsel for the prisoner was asked by the Judge if he desired to have a new trial on the charge as amended, but he declined. The then charges (*i.e.*, the two original charges and the additional charge) were then read to the jury, who, after deliberation, returned a verdict of "not guilty" on charges Nos. 1 and 2, and of "guilty" on the charge added, *viz.*, of abetment of murder by some person or persons unknown. On the application of Counsel for the prisoner, the following points were reserved:—(1) Whether, under the circumstances, the Court had power to add a new charge; (2) whether the verdict returned on the new charge was valid, the prisoner not having been called upon to plead to it. It was held (SCOTT, J., dissenting) that the Judge was wrong in framing a new charge in addition to the original charges, but that the error was one of form, and not of substance, and therefore, under s. 537, *post*, the Court refused to interfere with the conviction. The Court also considered that, having regard to the provisions of ss. 228, 229, and 230, the charge of abetment of murder by B might have been changed into one of abetment of murder generally. It was held further, that, in any case, the conviction was good under ss. 236 and 237. It was doubtful whether the evidence would establish the offence of murder, abetment of murder by B, or abetment of murder by some one unknown. Even if there had been no charge properly framed, the Judge might, under s. 237, have accepted the verdict returned by the jury, and entered it on the record. The fact that the Judge framed a charge which, *ex hypothesi*, was beyond his authority, and accepted a verdict on that charge, did not affect the legality of the conviction.

The omission, it was considered, to read and explain the charge to the prisoner did not, under the circumstance, prejudice the prisoner, and was therefore immaterial.

Ch. XIX s. 227 In *Reg.* v. *Govind Babli Raul*, 11 Bom. H. C. R., 278, which was a case under the Act of 1872 decided by WEST and NUNABHAI, JJ., the Sessions Judge had substituted a charge of abetment of murder for a charge of murder, and it was assumed it could be done.

The power to alter a charge ought to be exercised with caution.—*Reg.* v. *Govindas Haridas*, 6 Bom. H. C. R., Cr., 76.

Where an accused person is committed to take his trial on specific charges before the Sessions Court, the Judge has no power under this section to expunge a charge before calling upon the accused to plead.—*Empress* v. *Poreshollah Sheikh*, 7 C. L. R., 143. In that case the committing Magistrate sent up the accused to be tried under ss. 323 and 325 of the Indian Penal Code. The Sessions Judge, before calling upon the accused to plead, expunged the charge under s. 325. The Court (MITTER and MACLEAN, JJ.) said: "We think he (the Sessions Judge) had no power to do this under the Criminal Procedure Code, s. 446 (s. 226 of the present Code). The prisoner should have been called upon to plead to both charges. If the accused had pleaded not guilty to the charge under s. 325, the Sessions Judge, after recording evidence, might have recorded a finding in favor of the accused under s. 251 (s. 259 of the present Code) if there was no evidence to support the charge under that section."

The omission on the part of a Magistrate to frame the charge so as to contain a separate head for each offence may be remedied by the Sessions Judge (*Queen* v. *Kalaram Sing*, 7 W. R., Cr., 8); but not after delivery of the verdict.—*Queen* v. *Sheikh Ali*, 5 Bom. H. C. R., Cr., 9.

Charges which require alteration should, as a rule, be amended by the Court of Session before the trial commences. The charge as amended must still run in the name of the committing officer.—*Mad. H. C. Pro., 30th August and 8th September* 1862, *Weir*, p. 4.

In the case of *Sreenath Kur*, I. L. R., 8 Calc., 450; (S. C.) 11 C. L. R., 522, a prisoner was committed on 55 counts including three counts under ss. 167, 466, and 471 of the Penal Code. At the trial before the District Judge sitting with assessors, the Court informed the prisoner (without altering the charge) that the trial would be confined to the three counts last mentioned. The prisoner was convicted on these, but the Court allowed evidence to be given by the prosecution on all the remaining charges, and in respect of these the prisoner was acquitted. The High Court, on appeal, held, that the District Judge should have amended the charge (see s. 227), and then proceeded to hold separate trials; that he should not have tried together the counts under ss. 167 and 466 of the Penal Code, as the offences were not of the same kind (see s. 234, *post*), but the convictions were upheld, as it did not appear that the prisoner had been prejudiced by the mode of trial adopted. (See s. 537, *post*.)

In exercise of the powers conferred by s. 35 of the Court Fees Act (VII of 1870), the Governor-General in Council was pleased to remit the fees leviable on copies of charges given to accused persons under the corresponding section of Act X of 1872.—*Gazette of India*, 1873, p. 520. Under s. 210, *supra*, the accused is entitled, if he requires it, to have a copy of the charge free.

As to the effect of errors or omissions in charges, see ss. 232, 535, and 537, *post*.

227. Any Court may alter any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

Court may alter charge.

Every such alteration shall be read and explained to the accused.

Act X of 1872, ss. 444, 445; Act X of 1875, ss. 9, 10; Act IV of 1877, ss. 99, 100.

If the word 'alter' in this section, it was held by the Bombay High Court, is to be taken to include 'addition' as it does in s. 226, the addition permitted must be

227. Conviction for an offence different from that with which accused is charged — It is competent to the Court to alter the charge under section 227 of the Criminal P. Code and under section 238 to convict the accused of the minor offence which the evidence established.

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an addition to some specific charge in the nature of an alteration, and not the addition of a new charge.—*Per* SARGENT, C. J., and BAYLEY, J. (SCOTT, J., dissenting), *Empress* v. *Appa Subhana Mendre*, I. L. R., 8 Bom., 200. See note to s. 225 as to the meaning of the word 'charge' as used by SARGENT, C. J., BAYLEY and SCOTT, JJ. SCOTT, J., was of opinion that the word 'alter' in this section must be taken to be equivalent to "add to, or otherwise alter," used in s. 226, and that, consequently, the addition of a new "head of charge" is an alteration within the meaning of the section. In the case just referred to, it was held, that the omission to read and explain the altered charge to prisoner did not, under the circumstances (see the facts of the case set out in note to preceding section), prejudice the prisoner, and was therefore immaterial. Ch. XIX s. 227

In Madras, in the case of *Mutirakal Kovilaghatta Rama Varma*, I. L. R., 3 Mad., 351, R, having been committed by a Magistrate for trial by a Sessions Court on a charge under s. 202 of the Indian Penal Code, of having intentionally omitted to give information which he was legally bound to give respecting a murder, pleaded guilty on his trial to the charge on which he was committed. Upon the application of the Public Prosecutor, the Sessions Judge, under protest on the part of the prisoner, added a charge under ss. 109 and 201 of the Indian Penal Code of abetting C, a female prisoner charged with having assisted burying the body of the murdered person, required R to plead to the charge, and having tendered a pardon to and examined C as a witness, convicted R. It was held that, as there was no evidence before the Magistrate to support the charge against R framed by the Sessions Judge, the action of the Judge was *ultra vires*, and that the conviction on the added charge was illegal. The Court considered that, inasmuch as the Sessions Judge considered R more culpable than C, the proper course would have been to have adjourned the trial, sent the record to the Magistrate, and suggested an inquiry as to whether there was ground for a more serious charge against R. The Court said: "The action of the Judge in adding the charge must be pronounced *ultra vires*, and as this is not a mere error of procedure, but an improper assumption of jurisdiction, the conviction on the added charge must be quashed." SCOTT, J., in the case of *Empress* v. *Appa Subhana Mendre*, I. L. R., 8 Bom., 200, commented on that case. He said: "It is argued that, although a *substitution* of a head of charge is admissible, an *addition* of a head is not admissible. I am unable to follow that argument. It seems to me that an addition comes within the spirit of the Act as much as a substitution, always provided that it arises out of the same transaction, and its introduction does not prejudice the prisoner." This seems to be the view of the High Court of Madras. In the case of *Mutirakal Kovilaghatta Rama Varma* v. *Reg.*, I. L. R., 3 Mad., 351, the Sessions Judge had added a charge of abetment after the trial had commenced, and although his action was held to be *ultra vires*, it was so held on the sole ground that the charge added could not be supported by the evidence taken before the Magistrate. It appears clearly from the judgment of the Court that the Judge could have either "amended or altered the original charge," or "could have supplied a charge," provided it was "provable by the evidence before the Magistrate." Now, in the present case, the charge was provable by the evidence taken by the Magistrate, in fact no other was offered. The addition made, therefore, would seem admissible on the authority of the Madras case. The remarks of WEST, J., in the case of *Empress* v. *Baban Khan Valad Mhaskoji*, I. L. R., 2 Bom., 142, p. 144, are important, and ought to be borne in mind. He said: "We think that the first head of the charge in this case did not give to the accused the information which the law intended him to have, of the particular offence expressed circumstantially, to which he was called upon to answer. The description of crimes in the Penal Code must, of necessity, be expressed in abstract terms, but the very object of a trial is to determine whether particular acts or omissions on the part of the accused fall or do not fall within the rule thus abstractedly stated. . . . The least that can fairly be allowed in favour of one criminally convicted is, that when a charge has been expressed in vague terms, the prosecution should be limited on appeal to the particular sense in which these terms have been understood in the actual trial."

The omission on the part of a Magistrate to frame the charge so as to contain a separate head for each offence may be remedied by the Sessions Judge (*Queen* v. *Kalaram Sing*, 7 W. R., Cr., 8); but not after delivery of the verdict.—*Queen* v. *Sheik Ali*, 5 Bom. H. C. R., Cr., 9.

Ch. XIX secs. 228-229

Charges which require alteration should, as a rule, be amended by the Court of Session before the trial commences. The charge as amended must still run in the name of the committing officer.—*Mad. H. C. Pro.*, *30th August and 8th September* 1862, *Weir*, p. 4. The power to alter ought to be cautiously exercised. —*Reg.* v. *Govindas Haridas*, 6 Bom. H. C. R., Cr., 76.

As to the effect of errors or omissions in charges, see ss. 232, 535, and 537, *post.* See note to s. 225, *supra.*

When trial may proceed immediately after alteration.

228. If the charge framed or alteration made under section 226 or section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may in its discretion, after such charge or alteration has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

Act X of 1872, s. 447; Act X of 1875, s. 11; Act IV of 1877, s. 101.

When new trial may be directed, or trial suspended.

229. If the new or altered charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

Act X of 1872, s. 448; Act X of 1875, s. 12; Act IV of 1877, s. 102.

See *Mutirakal Kovilaghatta Rama Varma* v. *Reg.*, I. L. R., 3 Mad., 351 (quoted under s. 227), as to circumstances under which the High Court considered that a case should have been adjourned for inquiry.

The object of restricting a Sessions Court from taking cognizance of any offence (except as provided by ss. 477, 478, 480, 485), unless the accused person has been committed by a Magistrate, is to secure the prisoner a preliminary inquiry which affords him an opportunity of becoming acquainted with the circumstances of the offence imputed to him, and enables him to make his defence.—*Mutirakal Kovilaghatta Rama Varma* v. *Reg.*, I. L. R., 3 Mad., 351.

Where proceedings, which had already been taken against the accused before another Magistrate, had been quashed and a new trial directed, the Magistrate holding the new trial is not justified in referring to the former record as a whole, but only to such portions of it as have been specially put in evidence before him.—*In re Davi Dutt*, 7 C. L. R., 193.

In the case of *Reg.* v. *Govind Babli Raul*, 11 Bom. H. C. R., 278, while A and B were tried jointly, A for murder and B for abetment of murder, a confession by A that he had committed the murder at the instigation of B was put in as evidence against himself. Subsequently, the charge against A was altered to abetment of murder, and the trial proceeded; and the Court, under the authority of s. 30 of the Evidence Act, used the confession against both and convicted both, B's pleader not having objected to admissibility of the confession against his client. The High Court upheld the conviction. "It is only," it was said, "in the case of charges closely related that a trial goes on forthwith after an amendment, and in this instance the original and amended charges are so nearly related that, in the absence of technical objections urged on behalf of the prisoner, the trial might, without unfairness, be deemed, for the reception of evidence and all other purposes, to have been a trial on the amended charge from the commencement."

230. If the offence stated in the new or altered charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Stay of proceedings if prosecution of offence in altered charge require previous sanction.

Act X of 1872, s. 450 ; Act X of 1875, s. 16 ; Act IV of 1877, s. 104.

Section 537 provides, that no finding, sentence, or order passed by a Court of competent jurisdiction shall be reversed or altered under Chap. XXVII, or on appeal or revision, on account of the want of any sanction required by s. 195, unless the omission has occasioned a failure of justice. It does not deal with cases where prosecutions have been instituted against public servants without the sanction required under ss. 132 and 197.

231. Whenever a charge is altered by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon, and examine with reference to such alteration, any witness who may have been examined.

Recall of witnesses when charge altered.

Act X of 1872, s. 449 ; Act X of 1875, s. 15, omitting the words 'during the trial;' Act IV of 1877, s. 103.

232. If any Appellate Court or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

Effect of material error.

If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration.

A is convicted of an offence under section 196 of the Indian Penal Code, upon a charge which omits to state that he knew the evidence which he corruptly used or attempted to use as true or genuine was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge ; but if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

Act X of 1872, s. 451. The illustration to that section was amended by Act XI of 1874, s. 40.

Section 535 provides, that no finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has been occasioned thereby. If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge shall be framed, and that the trial be recommenced from the point immediately after the framing of the charge. See also s. 537, *infra*.

Ch. XIX s. 233 Mr. Justice Stephen, in his History of Criminal Law, Vol. III, p. 337, in a note on ss. 221, 240 of the present Code, says: "I drew these sections in the Code of 1872. They are re-enacted with little alteration." And he then goes on to say: "The provisions relating to 'charges' are intended to provide that 'the charge' shall give the accused full notice of the offence charged against him, but that the only result of any defect in the charge shall be an amendment in terms as to delay or a new trial, if the accused seems to have been misled."

It is quite clear from this passage, SCOTT, J., considered, that the intention of the Legislature was to permit all amendments which would not prejudice the prisoner in his defence. In other words, prejudice to the prisoner was intended for the future to be the test of admissibility or rejection of proposed amendments. See *Empress* v. *Appa Subhana Mendre*, I. L. R., 8 Bom., 200, p. 213.

The very object of a trial is to determine whether particular acts or omissions on the part of an accused do or do not amount to the particular offence to which an accused person is called upon to answer. In the case of *Empress* v. *Baban Khan Valad Mhaskoji*, I. L. R., 2 Bom., 142, it appeared that the first head of the charge did not give to the accused the information which the law intended him to have of the particular offence to which he was called upon to answer. On appeal, the Court laid down a rule in the following words: "The least that can fairly be allowed in favour of one criminally convicted is, that when a charge has been expressed in vague terms, the prosecution should be limited to the particular sense in which these terms have been understood at the trial."

New Trial.—Where proceedings, which had already been taken against the accused before another Magistrate, had been quashed, and a new trial directed, the Magistrate holding the new trial is not justified in referring to the former record as a whole, but only to such portions of it as have been specially put in evidence before him.—*In re Devi Dutt*, 7 C. L. R., 193.

Joinder of Charges.

233. For every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236, and 239.

Separate charges for distinct offences.

Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and the causing grievous hurt.

Act X of 1872, s. 452; Act X of 1875, s. 17; Act IV of 1877, s. 105.

As to the meaning of the word 'charge,' see notes to the preceding sections.

It has been questioned whether a charge containing alternative charges of perjury can be reconciled with the provisions of this section, which requires that each offence shall be subject of a separate charge except in the particular cases provided for by the section. But it was held by a majority of the Full Bench in *Queen* v. *Mahomed Humayoon Shaw*, 21 W. R., Cr., 72; 13 B. L. R., 324, that such a charge is not a charge of two offences, but of one. See *Habibullah* v. *Empress*, I. L. R., 10 Calc., 937. The form of charge given in Sched. V, XXVIII-*II* (4), and sanctioned by s. 554, *post*, may be followed, whether the two inconsistent statements in respect of which the perjury is assigned are made in one deposition or on different occasions.—*Ibid.* See *Empress* v. *Ghulet*, I. L. R., 7 All., 44, overruling *Empress* v. *Niaz Ali*, I. L. R., 5 All., 17.

In the case of *Empress* v. *Ramji Sajabarao*, I. L. R., 10 Bom., 124, the accused was charged, in the alternative, by the trying Magistrate as follows:—"That you, on or about the 13th day of October 1882, at Nandarpada, stated that you had seen V. and M. carrying teakwood from Gohe Forest, to Narayan Ram Chandra, Range Forest Officer; and on 14th February 1885, you stated on oath before the first class Magistrate at Pen, at the trial of these persons, that you did not see where they had brought the wood from, and thereby committed an offence

// Charges for using forged documents in three sets on three separate occasions

§ 233. Three sets of documents of the accused which were forged were put in three separate [illegible] simultaneously. The accused was tried on three charges and convicted and sentenced. On appeal it was contended that a separate charge should have been framed in respect of each of the documents as the using of each of the document constituted a distinct and separate offence. Held that as the "using" charged was the putting in of each set of documents simultaneously there was only one using in respect of each set of documents.

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punishable under s. 182 or s. 193 of the Indian Penal Code." At the trial the accused asserted the truth of the former of these two statements, and denied having made the other. The Magistrate was unable to find which of them was false, and convicted the accused, in the alternative, either under s. 182 or s. 193 of the Indian Penal Code. The Court held, that the charge was bad in law, being an alternative charge in a form forbidden by s. 233 of the Criminal Procedure Code, which directs that, for every distinct offence of which any person is charged, there shall be a separate charge. It was also held, that the accused could not be tried upon a charge framed in the alternative as in the form given in Sched. V, XXVIII (4) of the Criminal Procedure Code, as, upon the facts alleged, there was no way of charging him with one distinct offence on the ground of self-contradiction. He could not successfully be charged under s. 193 of the Penal Code, on contradictory statements, because he only made one deposition, in which there were no discrepancies; and, similarly, he could not be charged under s. 182 of the Penal Code, for he only once gave information to a public servant.

It was considered also that, having regard to ss. 225, 232, and 537 of the Criminal Procedure Code, the accused, convicted upon such a charge, must be held to have been misled in his defence, and his conviction and sentence reversed.

The Court expressed its opinion that, in charges founded upon supposed contradictory statements, every presumption in favour of the possible reconciliation of the statements must be made. See *Empress* v. *Ghulet*, I. L. R., 7 All., 44.

Three offences of same kind within year may be charged together.

234. When a person is accused of more offences than one of the same kind, committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial, for any number of them not exceeding three.

Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code, or of any special or local law.

This section corresponds with Act X of 1872, s. 453, omitting the explanation; Act X of 1875, s. 18; and Act IV of 1877, s. 106. Compare the Statute 24 and 25 Vict., c. 96, s. 5, which provides, that "it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them."

This section modifies the preceding section, which requires a separate charge and a separate trial for every distinct offence, by allowing three charges of three distinct offences of the same kind and committed within one year of each other to be tried together. An accused person may be separately tried for other offences. This is clear from illustration (*b*) to the next section.—*In re Ram Manikya Chuckroburty*, 1 C. L. R., 478; (S.C.) I. L. R., 3 Calc., 540. There is nothing in the section to prevent an accused from being separately charged and tried on the same day for any number of distinct offences of the same kind committed within the year. It simply places a statutory limit on the number of charges which may legally form part of a single trial. See next section, illustration (*b*). See also *Reg.* v. *Hanmanta*, I. L. R., 1 Bom., 611; *Empress* v. *Murari*, I. L. R., 4 All., 147.

As to case of any irregularity, see s. 537, *post*.

Offences under ss. 167 and 466 of the Penal Code respectively are not of the same kind (*Sreenath Kur* v. *Empress*, 10 C. L. R., 421; (S. C.) I. L. R., 8 Calc., 450); nor are the offences of receiving or retaining stolen property punishable under s. 411, and of habitually receiving or dealing in such property punishable under s. 413 of the Indian Penal Code, the same within the meaning of this section.—*Uttom Koondoo* v. *Empress*, 10 C. L. R., 466; (S. C.) I. L. R., 8 Calc., 634.

In the case of *Empress* v. *Murari*, I. L. R., 4 All., 147, the Allahabad High Court (Straight, J.) held, under Act X of 1872, that the combination of three

Ch. XIX s. 235 offences of the same kind for the purpose of one trial could only be where they have been committed in respect of one and the same person, and not in respect of different prosecutors, within the period of twelve months.

The Calcutta High Court (FIELD and NORRIS, JJ.), however, refused to follow the decision in that case, holding that "offences of the same kind" are not limited to offences against the same person.—*Manu Miya* v. *Empress*, I. L. R., 9 Calc., 371; (S. C.) 11 C. L. R., 522. See the remarks of Lord Blackburn in *Reg*. v. *Castro*, L. R., 6 App. Ca., 229. In the Calcutta case, the accused was charged under the same charge with house-breaking by night with intent to commit a theft in the house of A, and also with the same offence in the house of B, and upon his own plea was found guilty; and on appeal the conviction was upheld. NORRIS, J., pointed out, however, that Judges should take care that prisoners are not prejudiced by charges being joined, and should at all times be anxious to lend a willing ear to any application for separation of charges and for separate trials upon separate charges.

In the case of *Empress* v. *Juala Prosad*, I. L. R., 7 All., 174, the cases of *Empress* v. *Murari*, I. L. R., 4 All., 147, and *Manu Miya* v. *Empress*, I. L. R., 9 Calc., 371, were considered by a Full Bench of the Allahabad High Court. There a postmaster was accused of having, on three different occasions, within a year, dishonestly misappropriated moneys paid to him by different persons for money orders, and the Full Bench held that the offences were "of the same kind," being dishonest misappropriations by a public servant of public moneys (for as soon as they were paid they ceased to be the property of the remitters), and that the accused might, therefore, be charged, under s. 234, with, and tried at one trial for, all three offences.

As to the case of *Empress* v. *Murari*, I. L. R., 4 All., 147, PETHERAM, C. J., who delivered the judgment of the Full Bench, said, "that (case) was decided by Justice STRAIGHT under a different Statute, Act X of 1872, and his decision in that case will be unaffected by ours in this."

235. I.—If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

I.—Trial for more than one offence.

II.—If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

II.—Offence falling within two definitions.

III.—If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, or for any offence constituted by any one or more of such acts.

III.—Acts constituting one offence, but constituting when combined a different offence.

Nothing contained in this section shall affect the Indian Penal Code, section 71.

Illustration

to paragraph I—

(*a*.) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with, and tried for, offences under ss. 225 and 333 of the Indian Penal Code.

(*b.*) A commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with, and convicted of, offences under ss. 454 and 497 of the Indian Penal Code.

(*c.*) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under ss. 498 and 497 of the Indian Penal Code.

(*d.*) A has in his possession several seals knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under s. 466 of the Indian Penal Code. A may be separately charged with, and convicted of, the possession of each seal under s. 473 of the Indian Penal Code.

(*e.*) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding; and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charge. A may be separately charged with, and convicted of, two offences under s. 211 of the Indian Penal Code.

(*f.*) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under ss. 211 and 194 of the Indian Penal Code.

(*g.*) A, with six others, commits the offences of rioting, grievous hurt, and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under ss. 147, 325, and 152 of the Indian Penal Code.

(*h.*) A threatens B, C, and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under s. 506 of the Indian Penal Code.

The separate charges referred to in illustrations (*a*) to (*h*) respectively may be tried at the same time.

to paragraph II—

(*i.*) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under ss. 352 and 323 of the Indian Penal Code.

(*j.*) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit. A and B may be separately charged with, and convicted of, offences under ss. 411 and 414 of the Indian Penal Code.

(*k.*) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under ss. 317 and 304 of the Indian Penal Code.

(*l.*) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under s. 167 of the Indian Penal Code. A may be separately charged with, and convicted of, offences under ss. 471 (read with 466) and 196 of the same Code.

to paragraph III—

(*m.*) A commits robbery on B, and, in doing so, voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under ss. 323, 392, and 394 of the Indian Penal Code.

Act X of 1872, s. 454, omitting illustrations (*e*), (*h*), (*i*), and (*k*) to that section; Act X of 1875, s. 19; Act IV of 1877, s. 107. The last clause is new.

The provisions of the former Acts as to the amount of punishment have been omitted, as they belong to substantive law and not to procedure. As pointed out by Mr. Mayne in his Commentaries on the Indian Penal Code, 12th Edition, p. 43, s. 235, combined with s. 71 of the Penal Code, seems to reproduce the provisions of Act X of 1872. The omission of all references to punishment in the section itself and in the illustrations which were contained in the repealed section (454) shows, that it is to be treated merely as containing rules for criminal pleading and procedure, and that the rules for assessment of punishment must be sought for in s. 71 of the Penal Code as amended by Act VIII of 1882, and in s. 35, *ante*.

Ch. XIX s. 235 Section 71 of the Penal Code, as amended by s. 4 of Act VIII of 1882, which is to be read in connection with this section, is as follows :—

"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of his offences, unless it be so expressly provided.

"Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences." [Act VIII of 1882, s. 4.]

Illustrations.

"(*a.*) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

"(*b.*) But if, while A is beating Z, Y interferes, and A intentionally strikes Y. Here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z and to another for the blow given to Y."

Where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass and at the same time committed mischief, TURNER, J., held, that he could not, under cl. iii of s. 454 of the Criminal Procedure Code, receive a punishment more severe than might have been awarded for either of such offences.—*Empress* v. *Budh Singh*, I. L. R., 2 All., 101.

Under s. 454 of Act X of 1872 it was held, that the collective punishment awarded under ss. 147, 148, and 324 of the Penal Code must not exceed that which may be awarded for the graver offence. See illustration (*g*) to this section.—*In re Jubdur Kazi*, I. L. R., 6 Calc., 718 ; (S. C.) 8 C. L. R., 390 ; *Reg.* v. *Tukaya Bin Tamana*, I. L. R., 1 Bom., 214 See also *Reg.* v. *Dod Basaya*, 11 Bom. H. C. R., 13.

When a prisoner is tried on several heads of charge, the most convenient course with reference to appeals is to enter up findings on all the counts ; though where the several heads of charge are all founded on one continuous transaction, punishment can only be awarded on one.—*Mad. H. C. Pro.*, *4th July* 1867, *Weir*, p. 43.

In Madras, where a prisoner was tried, convicted, and punished under s. 369 of the Penal Code for the offence of abducting a child with intent dishonestly to take moveable property, it was held, that he could not also be punished for the theft of a part of the moveable property which he intended dishonestly to take through means of the abduction. The Court, MORGAN, C. J., and HOLLOWAY, J., made the following observations :—

"The immediate question is, whether a prisoner tried, convicted, and punished under s. 369 of abducting a child with intent dishonestly to take moveable property can also be punished for the theft of a part of the moveable property which he intended dishonestly to take through means of the abduction.

"Save for the new Code, this course would be illegal under the repeated decisions of this Court. Section 454 I (*c*) is the section by which this process is to be supported, if at all. If the words of this branch are taken in connexion with those of s. 452, which precedes it, and of branches II and III, they do not do so. Section 452 contains a rule of criminal pleading as to the necessity of a separate charge and a separate trial for each distinct offence. Then s. 453 (similarly to the English rule as to several embezzlements) modifies this rule as to offences of the same kind committed within a year. The pre-requisites of joinder are similarity of the offences and their falling within the time. Then, strangely enough, s. 455 is quoted as the key to the similarity, and the result seems to be that they are similar when it is doubtful to which of them the proveable facts in each may amount. It can, we suppose, scarcely be meant that the element of doubt is to be the governing point. It perhaps means that where, as in the illustration, the criminative facts which constitute the offence are so nicely shaded that it is often doubtful *primâ facie* to which specific definition the facts are to be subsumed, there may be a joint trial.

"A further modification of the rule of severance is introduced in s. 454 I. Where facts 'so united as to form the same transaction' fulfil the requisites of the definitions of several offences, there may be one charge and one trial. Ch. XIX s. 235

"Nothing is here said about the punishment, and we have still a mere rule of criminal pleading modifying the general rule.

"It is not until we come to the illustrations that we find punishment imported, and, with the exception of (c) and (d), it may perhaps be said that the offences are all different in character. Those are mere transcripts of decided cases which seem inconsistent with the principles of others decided by the same Court. (e) is perhaps reconcilable if the kidnapping was for a different purpose; but if the kidnapping was for the purpose of subjecting to slavery, it will be impossible to reconcile it with other decisions and with the subsequent parts of this section.

"(b) embraces the case of three murders, and the legal principle is sound; though perhaps the application in practice will be found difficult.

"If we take the section, there is, therefore, nothing to overrule the previous decisions; but undoubtedly the kidnapping illustration is opposed to former decisions, and, unless explained as above, is direct authority for the two sentences passed in the present case.

"If, however, we are to import the illustrations as a gloss upon I, and as explanatory of its meaning, we must perform the like operation upon III, and must, if possible, reconcile all the three parts of the section.

"III says that where several facts aggregated form one offence, and if severed constitute several, the offender may be charged with every offence committed, but the utmost punishment awardable is the extreme punishment for the concrete or for one of the separate offences. We presume that the Court may elect whether it will punish for the one or the other, but it may not punish for both.

"Now the words of the section do not meet the case. Kidnapping with intent to steal is not an offence formed by the union of kidnapping with stealing, but by the union of kidnapping with intent to do it, and the result on the mere words would be that the section contains no inhibition of two punishments.

"The illustrations, however, show that the framers imagined that they had provided for the further case of the second offence being the substantive criminal act which was the aim of the intention in the former, and therefore evidentiary matter of that intent. Thus (n) house-breaking with intent to commit adultery, and the commission of it, may not be separately punished. Still nearer to the present case is (p). The enticing away (it does not even say for the purpose of committing adultery) and adultery may not be separately punished. The measure of the punishment is here again the largest amount awardable for one of the offences.

"The section, therefore, with its illustrations forbids two punishments for an offence so compounded that one substantive offence is the aim of the other, and evidentiary matter of the intent necessary to constitute that other. It is not narrowed to offences of a cognate character, for house-breaking and adultery have no more connexion than kidnapping and theft. We come to the conclusion, therefore, that, despite the inaptness of the words, there is nothing in these sections intended to alter the law; that, unless the illustrations are looked at, there is nothing to alter the principles upon which punishments were awarded before the Act passed; and that when they are all taken together, those attached to a branch which does introduce a limitation upon the power of punishment, must prevail over those attached to what is by itself a mere rule as to the joinder of charges.

"Read I and II together; they come to this, you may join them; but if, when joined, several make up one compound offence, you shall only punish for one. They shall be considered to make up such a compound when one of them is the criminal result at which the other has arrived. You may then punish to the extent permissible for any one of them, but you shall not tack the punishments together."—*Re Noujan*, 7 Mad. H. C. R., 375. It is to be observed that this case dealt with an illustration to s. 454 of Act X of 1872 which has not been reproduced.

Although persons may be tried in the same trial under the first clause of this section for more than one offence arising out of the same transaction, *e.g.*, for rioting and causing hurt, it is not illegal to try them for the different offences separately (*In re Amiruddin*, I. L. R., 8 Calc., 481; *Empress* v. *Ram Partab*, I. L. R., 6 All., 121, *per* STRAIGHT, J., p. 122); but a member of an unlawful assembly, some members of which have caused hurt, cannot lawfully be *punished* for the offence

Ch. XIX s. 235 of rioting as well as for the offence of causing hurt.—*Empress* v. *Ram Partab*, I. L. R., 6 All., 121; but see *Empress* v. *Dungar Singh*, I. L. R., 7 All., 29.

STRAIGHT, J., pointed out that, in case of riot where hurt or grievous hurt has been caused, it is convenient to try the offences of riot and grievous hurt together, as it often happens in the course of criminal trials that the evidence turns out inadequate to prove the most serious or more serious counts, but discloses sufficient to allow a conviction of a minor offence; and if the accused's plea to the count charging this has been taken at the outset of the proceedings, the trouble of alteration and amendment of the charge at a later stage is avoided. In dealing with the question of punishment, he said: "It seems to me that the plain meaning of the law as provided in s. 4 of Act VIII of 1882 is, that if in the course of a transaction a person commits different offences inextricably mixed up with one another, and all graduating towards, essential to, and culminating in a single distinct offence, he is not to be punished separately upon conviction for each single and distinct offence and for any or each of such other offences as well. For example, a man holds up his fist to another in a threatening manner, then he strikes him a slight blow with a stick, and ends by stabbing him with a knife. Technically he has committed an assault, has caused hurt and has caused grievous hurt, but no one would seriously contend that he should be punished separately for each of these offences. So in the present case the appellant was a member of an unlawful assembly, he participated in a riot, and in the course of such riot grievous hurt was caused by persons other than himself for which he was responsible in law as if his own hand had inflicted it, by reason of his being a member of an unlawful assembly of which they were also members. It was permissible to try and convict him for riot and for causing hurt or grievous hurt, as the case might be, in respect of each person assaulted, subject of course to the limitation of s. 234 of the Criminal Procedure Code as to the number of charges joined; but while he might be punished for the riot or upon each of the charges of grievous hurt separately, I do not think that different sentences can be framed for the riot and in respect of one or each of such other charges as well. In my opinion the riot is a part of those other offences, the force or violence incident to their commission converting what would otherwise have been a mere unlawful assembly into a riot."—P. 124.

In the case of *Empress* v. *Jubdar Kazi*, I. L. R., 6 Calc., 718; (S. C.) 8 C. L. R., 390, the Calcutta High Court (MITTER and MACLEAN, JJ.) doubted whether separate convictions under ss. 147 and 324 of the Indian Penal Code were legal, and they referred to *Reg.* v. *Durzoola*, 9 W. R., Cr., 33, in support of their view; but see *Reg.* v. *Calla Chund*, 7 W. R., Cr., 60; *Empress* v. *Ram Adhin*, I. L. R., 2 All., 139; *Reg.* v. *Dina Sheik*, 10 W. R., Cr., 63; *In re Nilrutton Singh*, 16 W. R., Cr., 45.

See ss. 34 and 35, *supra*, and the notes thereto.

In the case of *Empress* v. *Dungar Singh*, I. L. R., 7 All., 29, BROADHURST, J., dissenting from the opinion of STRAIGHT, J., in *Empress* v. *Ram Partab*, I. L. R., 6 All., 121, held that, under the first paragraph of s. 235, a person accused of rioting and of voluntarily causing grievous hurt may be charged with and tried for each offence at one trial, and that under s. 35, *supra*, a separate sentence might be passed in respect of each—the offences of rioting, of voluntarily causing hurt, and of voluntarily causing grievous hurt, each of the latter offences being committed against a different person, being all distinct offences within the meaning of the latter section.

That case was followed in *Jaffir Khan* v. *Empress*, Punjab Record, 1885, p. 71, and by TOTTENHAM and GHOSE, JJ., in *Lokenath Sircar* v. *Empress*, I. L. R., 11 Calc., 349. In the latter case A and B were charged with rioting, armed with deadly weapons, under s. 148 of the Penal Code, and they were also charged under s. 324, coupled with s. 149, with causing hurt by a dangerous weapon to X, and B was further charged under s. 324 with causing like hurt to Y, A being also charged under s. 324, coupled with s. 149, in respect of the hurt caused by B to Y. A and B were convicted on all charges, and separate sentences, to take effect in succession, were awarded in respect of each offence charged. The offences under s. 234 were committed during the riot. It was held that the several acts with regard to which the prisoners were charged did not fall within the provisions of s. 71 of the Indian Penal Code, inasmuch as it was not found that the causing of the hurt was the force or violence which alone constituted the rioting, and that, consequently, under s. 235, *post*, the several sentences passed were strictly legal. See *Reg.* v. *Durzoolla*,

236. Alternative charges, contradictory statements — where a person has made two contradictory statements one to a police officer making an investigation under chapter [illegible] Crim. P.C. and the other to a magistrate holding the [illegible], he cannot be charged and [illegible] convicted on an alternative charge.
In such a case if there is no other evidence at the trial but the contradictory statements made by the accused, alternate charges cannot be framed.
Emperor [illegible] [illegible] in Singapa
[illegible]

Alternative charges — see [illegible] Khan
Emperor
[illegible] 1935

9 W. R., Cr., 33; *Queen* v. *Dina Sheikh*, 10 W. R., Cr., 63; *Queen* v. *Shahabut Sheikh*, 13 W. R., Cr., 42; and *Empress* v. *Jubdar Kazi*, I. L. R., 6 Calc., 718; (S. C.) 8 C. L. R., 390. See also *Empress* v. *Pershad*, I. L. R., 7 All., 414 (F.B.)

In consequence of this difference of opinions expressed by STRAIGHT, J., in the case of *Empress* v. *Ram Partab*, I. L. R., 6 All., 121, and by BROADHURST in *Empress* v. *Dungar Singh*, I. L. R., 7 All., 29, and *Empress* v. *Pershad*, I. L. R., 7 All., 414, the matter of difference was referred to a Full Bench in *Empress* v. *Ram Sarup*, I. L. R., 7 All., 759, but it was unnecessary for the purposes of that case to decide upon the conflict. See *In re Chandra Kant Bhattacharjee*, I. L. R., Cr., 12 Calc., 495.

It must be borne in mind that no Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself jurisdiction or for the purpose of giving himself summary jurisdiction. Thus, a Magistrate, when he has before him a person charged with having been armed with a deadly weapon while a member of an unlawful assembly, is not at liberty to disregard that part of the charge which charges the prisoner with having been armed with a deadly weapon, and so to give himself jurisdiction to try the case summarily and then by inflicting sentence of imprisonment not exceeding three months to deprive the prisoner of his right of appeal.—*Empress* v. *Abdool Kurim*, I. L. R., 4 Calc., 78.

Where it is doubtful what offence has been committed.

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Illustration.

A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

See Act X of 1872, s. 455; Act X of 1875, s. 20; Act IV of 1877, s. 108.

This section applies to cases in which, not the facts are doubtful, but the application of the law to the facts is doubtful. Judgment in the alternative cannot be passed in cases in which it is doubtful whether the accused person is guilty of any one of the several offences charged, but where it is doubtful of which of those offences he is guilty.—*Queen* v. *Jamurha*, 7 N. W. P., 137.

The offences mentioned in the section are not in fact offences of the same kind, but offences of different kind arising out of a "single act or set of acts," and must have been committed at one and the same time.—*Mann Miya* v. *Empress*, I. L. R., 8 Calc., 371; (S. C.) 11 C. L. R., 522.

In *Reg.* v. *Mahomed Hoomayoon Shaw*, 13 B. L. R., 324, where a person was convicted of giving false evidence upon an alternative charge in the form given in Sched. III of Act X of 1872, the majority of the Full Bench (JACKSON and PHEAR, JJ., dissenting) held, that the conviction was good notwithstanding that the jury had not distinctly found which of the two statements was false. JACKSON, J., was of opinion that such a charge was bad, and further, that an alternative finding upon such a charge was invalid, while PHEAR, J., considered that although a person might be lawfully tried upon such a charge, the jury or the Court must, for a conviction, find specifically which branch of the alternative was true.

Under the present Code it has been held, that a conviction upon an alternative charge in the form provided by Sched. V, XXVIII-*II* (4), *post*, of giving false evidence, such evidence consisting of contradictory statements contained in *one* deposition while the accused was under cross-examination and re-examination as a witness in a judicial proceeding, was good, although there was no finding as to which

 of the contradictory statements was false.—*Habibullah* v. *Empress*, I. L. R., 10 Calc., 937, *per* WILSON and TOTTENHAM, JJ. (NORRIS, J., dissenting). So in *Empress* v. *Ghulet*, I. L. R., 7 All., 44, overruling *Empress* v. *Niaz*, I. L. R., 5 All., 17, a conviction was held to be good where the contradictory statements upon oath were made at different times and it was not shown which was false.

Where perjury is assigned upon a distinct allegation, the evidence of its falsity must be regularly taken in the case in which it is tried. If the whole proof consists of two conflicting statements, an alternative charge and finding are the regular course.—*Mad. H. C. Pro., 30th November* 1874, *Weir*, p. 5; *Proceedings*, 4 *Mad. H. C. R.*, 1874, *Weir*, pp. 4, 5.

In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided, if the same punishment is not provided for all.—*Penal Code, s.* 72.

In charges founded upon supposed contradictory statements, every presumption in favour of the possible reconciliation of the statements must be made.—*Empress* v. *Ramji Sajabarao*, I. L. R., 10 Bom., 124; *Empress* v. *Ghulet*, I. L. R., 7 All., 44.

For form of alternative charge under s. 193 of the Penal Code, see Sched. V, XXVIII-*II* (4).

The words "without a charge" in this section properly apply not only to a case in which there is no charge at all, but also to a case in which there is no charge of such offence as the Sessions Judge or Clerk of the Crown may think the prisoner ought to be tried for.—*Empress* v. *Appa Sabhana Mendre*, I. L. R., 8 Bom., 200. In that case A was tried at the Criminal Session of the High Court on a charge (1) of murder, (2) of abetting B to commit such murder. The jury having considered their verdict were asked by the Clerk of the Crown if they were agreed. The foreman replied that they were, and that their verdict was "guilty;" and when further asked, he said, "guilty of abetment—, abetment generally." On the application of Counsel for the prosecution, a charge was then added of "abetment of murder committed by some person or persons unknown." The additional charge was then read aloud to the jury, but was not specially explained to the prisoner, nor was he called upon to plead to it. Counsel for the prisoner was asked by the Judge if he desired to have a new trial on the charge as amended, but he declined. The three charges (*i.e.*, the two original charges and the additional charge) were then read to the jury, who, after deliberation, returned a verdict of "not guilty" on charges Nos. 1 and 2, and of "guilty" in the charge added, *viz.*, of abetment of murder by some person or persons unknown. On the application of Counsel for the prisoner, the following points were reserved: (1) Whether, under the circumstances, the Court had power to add a new charge; (2) whether the verdict returned on the new charge was valid, the prisoner not having been called upon to plead to it. It was held (SCOTT, J., dissenting) that the Judge was wrong in framing a new charge in addition to the original charges, but that the error was one of form, not of substance, and therefore, under s. 537, *post*, the Court refused to interfere with the conviction. The Court also considered that, having regard to the provisions of ss. 228, 229, and 230, the charges of abetment of murder by B might have been changed into one of abetment of murder generally. It was held further, that, in any case, the conviction was good under ss. 236 and 237. It was doubtful whether the evidence would establish the offence of murder, abetment of murder by B, or abetment of murder by some one unknown. Even if there had been no charge properly framed, the Judge might, under s. 237, have accepted the verdict returned by the jury and entered it in the record. The fact that the Judge framed a charge which, *ex-hypothesi*, was beyond his authority and accepted a verdict on that charge did not affect the legality of the conviction. The omission to read and explain the charge to the prisoner did not, under the circumstances, prejudice the prisoner, and was therefore immaterial.

In *Reg.* v. *Govind Babli Raul*, 11 Bom. H. C. R., 278, which was a case under the Act of 1872, decided by WEST and NUNABHAI, JJ., the Sessions Judge had substituted a charge of abetment of murder for a charge of murder, and it was assumed it could be done.

The power to alter a charge ought to be exercised with caution.—*Reg.* v. *Govindas Haridas*, 6 Bom. H. C. R., Cr., 76.

that with which accused is charged —
it is competent to the Court to alter the charge under section 227 Criminal P. Code and under section 238 to convict the accused of the minor offence, which the evidence establishes.
Queen Empress v. Khoda Nura I.L.R. 17 Bom 369

Conviction for minor offence where evidence is insufficient for grave offence —
238. Whereupon the complaint of the husband charging the accused with an offence under section 366 I.P.C. (Kidnapping or abducting a woman to compel her marriage) the magistrate convicted the accused under section 498 I.P.C. Held that such a case is within the intention of section 238 Crim P. Code. The intention of the law is to prevent magistrates enquiring, of their own motion into cases connected with marriage unless the husband or other person authorized moves them to do so. But when the husband is complainant and brings his complaint under § 366, a conviction under section 498 may properly be had if the evidence be such as to justify a conviction for the minor offence, and yet insufficient for a conviction for the graver one.
Jatra Sheikh v. Reazat Sheikh I.L.R. 20 C. 483

Ch. XIX secs. 237-238

237. If, in the cases mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

When a person is charged with one offence, he can be convicted of another.

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust, or of receiving stolen goods (as the case may be), though he was not charged with such offence.

Act X of 1872, s. 456; Act X of 1875, s. 21; Act IV of 1877, s. 109.

Where a person was charged by an Assistant Sessions Judge with (1) attempting to commit criminal breach of trust as a public servant, (2) framing as a public servant an incorrect document to cause an injury, (3) framing as such public servant an incorrect document to save a person from punishment, and was acquitted on the ground that he was not a public servant, though the Judge found that he had framed the document with a fraudulent intent, it was held that the Judge ought to have convicted him of attempting to cheat under ss. 455 and 456 of Act X of 1872; and, as the facts which he would have had to meet on that charge were the same as he had to meet on the charge of criminal breach of trust, allowed the objection urged at the hearing, though not distinctly taken in this appeal by the Government, and ordered a re-trial of the accused.—*Reg.* v. *Ramajirav Jivbajira*, 12 Bom. H. C. R., 1.

See note to preceding section.

238. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he is not charged with it.

When offence proved included in offence charged.

When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199, when no complaint has been made as required by that section.

Illustrations.

(*a*.) A is charged, under section 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under section 406.

(*b*.) A is charged under section 325 of the Indian Penal Code with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 335 of that Code.

See Act X of 1872, s. 457; Act X of 1875, s. 22; Act IV of 1877, s. 110.

 The last two clauses of the section and illustration (*b*), which is founded upon the case of *Queen* v. *Lukhenarain Agoori*, 23 W. R., Cr., 61, are new.

Section 198 deals with prosecutions for criminal breach of contract, defamation, and offences against marriage. Section 199 deals with prosecutions for adultery and enticing married women.

With reference to the observations of West, J., in *Reg.* v. *Chand Nur*, 11 Bom., 241 (quoted below), on the corresponding section of Act X of 1872, this section has been confined to offences consisting of several particulars, a combination of some only of which constitutes a complete minor offence. In that case the Bombay High Court annulled a conviction and sentence for abetment of murder, where the accused was charged with murder. West, J., said: "Section 457 applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The graver charge in such a case gives the accused notice of all the circumstances going to constitute the minor of which he may be convicted. The latter is arrived at by a mere subtraction from the former. But this is not the case where the circumstances embodied in the major charge do not necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also. The principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter. The section is not intended to apply to a collateral offence. It is not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself. When a man is accused of murder, he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it, which may be quite distinct from the circumstances constituting the murder itself. When, therefore, the Sessions Judge says that s. 457 warrants his convicting the accused of the abetment of murder on the original charge of murder itself without amendment, he departs from the intention of that section. For although, under special circumstances, abetment is to be deemed equivalent to the principal offence, yet it is plain that a charge of the latter simply as such gives no intimation of a trial to be held on the former."

This section also enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those parts constitute a minor offence.—*Govt. of Bengal* v. *Mahaddi*, I. L. R., 5 Calc., 871; (S. C.) 6 C. L. R., 349. See remarks of Sargent, C.J., in *Empress* v. *Appu Sabhana Mendre*, I. L. R., 8 Bom., 200. In the former case the accused were charged under s. 149, coupled with s. 325 of the Penal Code, with, while being members of an unlawful assembly, committing grievous hurt. The jury disbelieved the evidence as to the unlawful assembly, but unanimously found two of the accused guilty of grievous hurt, and it was held that the verdict was legally sustainable, although that offence did not form the subject of a separate charge. See *Empress* v. *Harai Mirdha*, I. L. R., 3 Calc., 189.

The offence of house-trespass as described in s. 452 of the Penal Code cannot be said to be any part of the charge either of dacoity or of riot. Accordingly, where a prisoner was charged with the latter offences, it was held that a conviction for house-trespass was bad where the charge of that offence had not been read out and explained to him and he was not called on to plead to it.—*Queen* v. *Salamut Ali*, 23 W. R., Cr., 59.

Where a dacoity was committed at Velanpor, a village in the territory of the Gaya Kevad, and a part of the stolen property was found in British territory, where it had been concealed, it was held that a conviction of dacoity could not be sustained, that being a substantive offence completed as soon as perpetrated at Velanpor, although had Velanpor been in British territory, the subsequent acts in the process of taking away the property might in the legal sense have coalesced with the first and principal one, so as to give jurisdiction under s. 67 of Act X of 1872 (s. 181 of this Code) in each district in which the property was conveyed.—*Reg.* v. *Lakhya Govind*, I. L. R., 1 Bom., 50. In that case the accused were convicted of dacoity, but the conviction was, on the facts stated, altered to one of retaining stolen property known to have been obtained by dacoity. See *Penal Code, s.* 412.

Framing of separate minor charges.—The High Court at Calcutta considered that, under the provisions of s. 457 of the Criminal Procedure Code of 1872, it was unnecessary to frame separate charges in respect of minor offences of the same class included in an offence of a graver character with which an accused person was charged.—***Calc. H. C. C. O., No.*** **9** ***of*** **26*th*** ***August*** **1878,** ***Wilkins,*** **p. 112.**

239. When more persons than one are accused of the same offence, or of different offences committed in the same transaction, or when one person is accused of committing any offence, and another of abetment of, or attempt to commit, such offence, they may be charged and tried together or separately as the Court thinks fit; and the provisions contained in the former part of this chapter shall apply to all such charges. Ch. XIX s. 239

What persons may be charged jointly.

Illustrations.

(*a*.) A and B are accused of the same murder. A and B may be charged and tried together for the murder.

(*b*.) A and B are accused of a robbery, in the course of which A commits a murder with which B has nothing to do. A and B may be tried together on a charge, charging both of them with the robbery, and A alone with the murder.

(*c*.) A and B are both charged with a theft, and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge, charging both with the one theft and B alone with the two other thefts.

Act X of 1872, s. 458; Act X of 1875, s. 23; Act IV of 1877, s. 111.

In prosecutions for giving false evidence under s. 193 of the Penal Code, the case of each person accused should be separately inquired into, and, if committed for trial, tried separately.—*Reg.* v. *Kureem*, 11 W. R., Cr., 16. It is wholly erroneous to include them in one joint trial.—*Empress* v. *Niaz Ali*, I. L. R., 5 All., 17. Similarly it was laid down by the Calcutta High Court that two or more persons committing acts of perjury on different occasions ought not to be tried on one charge.—*Cal. H. C. Cr. L.*, *20th July* 1885, 2 W. R., Cr., 2.

In the case of *Nathu Sheik* v. *Empress*, I. L. R., 10 Calc., 405, four persons were accused of having given false evidence in the same proceeding, and the Sessions Judge, while professing to try each accused person separately, heard the evidence of the witnesses only once. The High Court held that this was substantially trying the four prisoners together, and was an improper mode of procedure.

In the case of *Pulesanki Reddi* v. *Queen*, I. L. R., 5 Mad., 20, the convictions of 14 persons, who were charged together with distinct offences (committing nuisances) under ss. 290 and 291 of the Indian Penal Code, were set aside.

Upon trial of A for murder, and B for abetment thereof, a confession by A implicating B cannot be taken into consideration against B.—*Badi* v. *Empress*, I. L. R., 7 Mad., 579. But see *Reg.* v. *Govind Babli Raul*, 11 Bom. H. C. R., 278, where, after the trial had commenced, the charge against the first prisoner who had made a confession was altered from that of murder to abetment of murder, and his confession was used, under s. 30 of the Evidence Act, against his co-prisoner, who was charged throughout with abetment of murder only.

A conviction of a person who is tried jointly with other persons for the same offence cannot proceed merely upon the uncorroborated confession of one of such other persons.—*Empress* v. *Dosa Jiva*, I. L. R., 10 Bom., 231; *Empress* v. *Ashootosh Chuckerbutty*, I. L. R., 4 Calc. (F.B.), 483; (S. C.) 3 C. L. R., 270. See Mad. H. C. Proc., 12th Nov. 1866, Weir, p. 8.

The trials of the respective members of two opposing factions in a riot ought to be kept entirely distinct.—*Hossein Buksh* v. *Empress*, I. L. R., 6 Calc., 96; (S. C.) 6 C. L. R., 521. The members of each faction should be tried separately. It is wrong to commit the members of both parties for trial together upon joint charges as if they had had one common object.—*Queen* v. *Sheikh Bazu*, 8 W. R., Cr., 47; (S. C.) 4 Wym. Cr. Rul. (F. B.), 13; *Queen* v. *Durzoolla*, 9 W. R., Cr., 33.

Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other.—*In the matter of David*, 5 C. L. R., 574.

Where several persons were charged together with offences under ss. 148, 302, 324, and 326 read with s. 149 of the Penal Code, and the Sessions Judge, when about to examine the prisoners, required all but the prisoner under examination to withdraw from the Court, until his turn for examination came round, and convicted each prisoner chiefly upon what was said by his co-prisoners during his absence from Court, it was held, that the evidence so given was inadmissible.—*Empress* v. *Chandra Nath Sarkar*, I. L. R., 7 Calc., 65; (S.C.) 8 C. L. R., 352. See also *In re Chakowri Lall*, 13 C. L. R., 275. A course similar to that in the case of *Empress* v. *Chandra Nath Sarkar*, I. L. R., 7 Calc., 65; (S.C.) 8 C. L. R., 352, was pursued in the case of *Empress* v. *Lakshman Bala*, I. L. R., 6 Bom., 124, and the Bombay High Court, following the decision of the Calcutta High Court, also condemned the practice.

Withdrawal of remaining charges on conviction on one of several charges.

240. When more charges than one are made against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

Act X of 1872, s. 459, omitting the first ten words: "In trials before a Court of Session or High Court," and inserting the words 'the complainant.' Compare also Act X of 1875, s. 102, and Act IV of 1877, s. 112. The clause relating to withdrawals is new.

Section 494, *infra*, provides that any public prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person, and upon such withdrawal, if it is made before a charge has been framed, the accused shall be discharged; if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted.

The "officer conducting the prosecution" may, where he has had permission, be an officer of police.—*S.* 495, *post.*

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES.

Procedure in summons-cases.

241. The following procedure shall be observed by Magistrates in the trial of summons-cases.

Act X of 1872, s. 203, para. 1; Act IV of 1877, s. 114.

A summons-case is a case relating to an offence not punishable with death, transportation, or imprisonment for a term exceeding six months.—*S.* 4 (*t*), *supra.*

Evidence of witnesses who appear to be giving false evidence to be recorded at length in the vernacular.—When, during the investigation of a complaint under Chap. XX of the Code of Criminal Procedure, it may appear to the Magistrate that a witness is giving false evidence, so that criminal proceedings against

such witness are likely to be necessary, the Magistrate will exercise a sound discretion in taking down, under s. 359, at least the evidence of this particular witness at length in the manner prescribed in ss. 356, 357, and 360 of Act X of 1882.—*Calc. H. C. C. O., No. 4 of 30th March* 1864, *Wilkins*, p. 112.

In the investigation of a complaint which forms the subject of two distinct charges arising out of the same transaction, one of which is a summons and the other a warrant case, the procedure should be that for warrant-cases.—*Rajnarain Koonwar* v. *Lala Tamoli Raut*, I. L. R., 11 Calc., 91.

242. When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge.

Substance of accusation to be stated.

Act X of 1872, s. 203, para. 2, and the first clause of s. 206, para. 1; Act IV of 1877, s. 119.

Personal attendance of an accused person may be excused by the Magistrate under s. 205, *supra*. See note to that section.

It should be clearly stated to the accused that he is about to be put on his trial, and what is the nature of the offence with which he is charged.—*In re Acharjee Lall*, 3 C. L. R., 87.

243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and if he shows no sufficient cause why he should not be convicted, the Magistrate shall convict him accordingly.

Conviction on admission of truth of accusation.

Act X of 1877, s. 206, para. 2; Act IV of 1877, s. 120.

Where a written defence is tendered in a case tried under this chapter, the Magistrate is not bound to take down the defence of the accused by personally examining him.—*Dila Mundul* v. *Kally Shaha*, 16 W. R., Cr., 63.

244. If the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

Procedure when no such admission is made.

The Magistrate may, if he thinks fit on the application of the complainant or accused, issue process to compel the attendance of any witness or the production of any document or other thing.

The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

The first paragraph corresponds with Act X of 1872, s. 207 (see also Act IV of 1877, s. 121), and the last two paragraphs, with Act X of 1872, s. 361, and Act IV of 1877, s. 142.

Ch. XX s. 245 Section 355, *infra*, provides that in summons-cases tried by a Magistrate other than a Presidency Magistrate, the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds, such memorandum to be written and signed by the Magistrate with his own hand and to form part of the record.

The record to be made in Presidency Magistrates' Courts is provided for by s. 362, *infra*.

A Magistrate is bound to examine all the witnesses whom an accused person may produce for his defence.—*Ameer Chand Nohatta, Petr.*, 13 W. R., Cr., 63. And a conviction by a Magistrate who has refused to examine a witness formally tendered on behalf of the accused is absolutely illegal.—*Queen* v. *Mahima Chandra Chuckerbutty*, 4 B. L. R., Appx., 77.

Though this section imposes on the parties the duty of producing their evidence in summons-cases, the Court should, though not bound to do so by law, before convicting an accused person in such a case, take the precaution to ascertain from him whether he has evidence to produce in his defence, and if he says that he has, but his witnesses are not present in Court, should consider whether he should be allowed a further opportunity of bringing or summoning through the Court his witnesses.—*Empress* v. *Jewan Singh*, Punjab Record, 1884, p. 9.

Duty of Prosecution.—It is the *primâ facie* duty of the prosecution to call all the persons who are shown to be connected with the transactions connected with the prosecution, and who from such connection must be able to give material evidence. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution, and the only thing that can relieve the prosecution from calling such witnesses is the reasonable belief that, if called, they would not speak the truth.—*In re Dhunnoo Kazi*, I. L. R., 8 Calc., 121. It must be borne in mind that no corresponding inference can be drawn against the accused.—*Ib.*

All persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined.—*Empress* v. *Ram Sahai Lall*, I. L. R., 10 Calc., 1070. See note to s. 492, *post*.

Court-fees.—Where a complainant is required to pay fees or expenses for summoning witnesses under this section and fails to do so, the Magistrate must deal with the case on the evidence before him, and is not justified in dismissing the complaint under s. 247, *infra*.—*In re Korapulu* v. *Monappa*, I. L. R., 5 Mad., 160.

In non-cognizable cases, applications or petitions containing a complaint or charge of any offence are chargeable with a fee of 8 as. [Court Fees Act, VII of 1870, Sched. II (i) (*b*)]. Under s. 18 of the Act, where the application is made verbally and the examination of the complainant is reduced to writing, a like fee must be paid. Section 31 provides that, on conviction of the accused person, the Court shall, in addition to the penalty imposed upon him, order him to repay to the complainant the fee paid in the petition or application, or in the examination of the complainant, &c., and also the fees paid by complainant for serving processes. Fees so ordered to be repaid are to be recovered as if they were fines.

Acquittal.

245. If the Magistrate, upon taking the evidence referred to in section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

Sentence.

If he finds the accused guilty, he shall pass sentence upon him according to law.

Act X of 1872, s. 211, paras. 1 and 2; Act IV of 1877, s. 126.

For form of warrant of commitment on a sentence of imprisonment or fine if passed by a Magistrate, see Sched. V, No. 29.

An order for compensation against a complainant may be made on an order of acquittal.—*Mona Sheikh* v. *Ishan Bardhan*, I. L. R., 6 Calc., 581. As to compensation, see s. 250, *infra*.

A complaint may be both frivolous and false. The award of compensation for making a frivolous complaint does not preclude the Magistrate who makes it from subsequently sanctioning a prosecution for making a false complaint.—*Mad. H. C. Pro.*, 12*th Nov.* 1875, *Weir*, p. 5. He may make an order directing the complainant to make amends to the accused, notwithstanding that the complainant is to take his trial for perjury.—*Reg.* v. *Roopun Rae*, 15 W. R., Cr., 9; (S. C.) 6 B. L. R., 296.

Subordinate Magistrates should submit to the District Magistrate a calendar of every case in which conviction takes place within twenty-four hours from sentence being passed. Such a course of procedure enables the District Magistrate at once to take measures towards rectifying injury done by an illegal sentence.—*Bom. H. C. Cir.*, 43.

A Court is bound to pass some sentence if it records a verdict of guilty, though the sentence may be only nominal (*Mad. H. C. Pro.*, 12*th Aug.* 1869, *Weir*, p. 37); but a Judge in trials by jury is not warranted in passing a merely nominal sentence, because he cannot concur in a jury's verdict of guilty. In doing so, he would usurp the functions of a jury. He is bound to pass a sentence adequate to the offence found by the jury to have been committed.—*Mad. H. C. Pro.*, 8*th Nov.* 1866, *Weir*, p. 37.

The following rules as to military offenders are in force in Bombay and the Panjab:—When any person serving under the Government of Bombay, in the Military Department, is convicted in a Criminal Court, such Court shall inform the officer commanding the regiment or corps to which the convict belongs.—*Bombay Gazette*, 1879, pp. 471, 475.

In every case in which a military officer, or a soldier, is sentenced by a Criminal Court to a fine of Rs. 200 or upwards, or to imprisonment otherwise than in default of paying a fine not amounting to Rs. 200, the Court shall send a copy of its final order *proprio motu* to the immediate superior of the person convicted. Whenever a soldier is committed to jail, whether for trial or under sentence, his military rank should always be stated in the warrant of commitment in order that due notice may be given to the military authorities of the day and hour on which the imprisonment of such person will expire as required by the 33rd section of the Mutiny Act.—*Smyth*, p. 148.

Copies of convictions and sentences of persons in the Military Department.—Judicial Commissioners, Sessions Judges, and Magistrates must forward to the Military Department of the Government of India a copy of the conviction and sentence in all cases in which persons serving under the Government of India in that department are convicted in a Criminal Court.—*Calc. H. C. C. O.*, 17*th July* 1871, *Wilkins*, p. 139.

As to convictions of other Government servants, see Notification, Government of India, 7th August 1868.

Where an accused has been acquitted after the whole of the evidence for the prosecution in the case has been recorded, compensation may be awarded under s. 250, *post*.—*Empress* v. *Panda Valad Gopala*, I. L. R., 10 Bom., 199; *Number* v. *Ambu*, I. L. R., 5 Mad., 381; *Ali Ahmud* v. *Nathu*, Punjab Record, 1884, p. 19; *Gulab* v. *Sant Ram*, *ib.*

Finding not limited by complaint or summons.

246. A Magistrate may, under section 243 or section 245, convict the accused of any offence triable under this chapter which, from the facts admitted or proved, he appears to have committed, whatever may be the nature of the complaint or summons.

Act X of 1872, s. 203, para. 2, second clause; Act IV of 1877, s. 117.

It was held under Act X of 1872, that notwithstanding the extent towhich the complaint itself may go, and notwithstanding the terms of the summons, whatever they may be, the Magistrate may convict an accused person who has been summoned before him on the footing of a complaint of any offence which is the

Ch. XX secs. 247-248

subject of the definition in s. 148 [s. 4 (*t*) of this Code], if he thinks that the facts established by the complainant and his evidence only amount to an offence within that section.—*Mudoosoodun Sha* v. *Haridass Dass*, 22 W. R., Cr., 40.

Non-appearance of complainant.

247. If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused or any day subsequent thereto to which the hearing may be adjourned the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day.

This section consolidates the provisions of ss. 205, 208, para. 3, and s. 212 of Act X of 1872; see also Act IV of 1877, s. 118.

The former Code provided that if the complainant did not appear, the Magistrate should dismiss the complaint; and under s. 212, the dismissal of a complaint operated as an acquittal. See also *Nund Lall Sootrodhur* v. *Bhagirutty Sootran*, 10 W. R., Cr., 31; *Eastern Bengal Railway Co.* v. *Kali Dass Dutt*, 23 W. R., Cr., 63; *Irfan Biswas* v. *Jinnut Bibee*, 25 W. R., Cr., 63. The present Code, it will be seen, provides for the acquittal of the accused, unless the Magistrate thinks proper to adjourn the case.

As to dismissal of a complaint after examining the complainant, see s. 203, *supra*, p. 192. Unless a charge has been drawn up, no order of acquittal can be passed.—*Reg.* v. *Japit Ahir*, 22 W. R., Cr., 25.

If the proceedings before the Magistrate have been so irregular as to amount to no trial, the acquittal will be invalid.—*Mad. H. C. Pro.*, 17*th Aug.* 1875, *Weir*, p. 7.

Adjournments.—It is not an irregularity to adjourn the trial for the purpose of allowing the accused to secure the attendance of his witnesses.—*In re Dinoo Roy*, 16 W. R., 21.

If, when a case has been adjourned, the complainant does not appear upon the day fixed for the hearing, the Magistrate may acquit the accused.—*Mudoosoodun Sha* v. *Haridass Dass*, 22 W. R., Cr., 40. Ordinarily the order for adjournment must be made in the presence and hearing of the parties.—*Mad. H. C. Pro.*, 24*th Feb. and* 17*th Aug.* 1875, *Weir*, p. 2.

A case having been transferred from the file of one Magistrate to that of another was, on the day fixed, called on for hearing, but the complainant not appearing, the case was dismissed under this section. It appeared that the complainant and his witnesses, though not in attendance in the Magistrate's Court, were present in another Court in the same courthouse, the complainant being under the impression that his case had been transferred to the Magistrate of that Court. PRINSEP and TOTTENHAM, JJ., treated the case as if the complainant had been present in Court, holding that, under the circumstances, the provisions of the section had been improperly applied.—*In re Romanath Bal* v. *Behari Bagdi*, 13 C. L. R., 303.

Where a complainant is required to pay fees or expenses for summoning witnesses under s. 244 and fails to do so, the Magistrate must deal with the case on the evidence before him, and is not justified in dismissing the complaint under this section.—*In re Korapulu* v. *Monappa*, I. L. R., 5 Mad., 160. As to fees and processes in non-cognizable cases, see note to s. 244, *supra*.

A Magistrate, it was held, was not bound, before acquitting a person under this section, to wait till the Court is about to close for the day to give an absentee complainant an opportunity of appearing.—*Kuttiyali* v. *Pari Makri*, I. L. R., 7 Mad., 356. See *Rangasami Ayyangar* v. *Narasimhula*, I. L. R., 7 Mad., 213.

Withdrawal of complaint.

248. If a complainant, at any time before a final order is passed in any case under this chapter, satisfies the Magistrate that there are

This section is repealed by section 1.
of Act IV of 1891.
See however section 560(1) which is
in lieu of § 250.

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sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

Act X of 1872, s. 210; Act IV of 1877, s. 125.

In cases of contempt of the lawful authority of a public servant, the complainant referred to in this section is the public servant whose authority has been resisted, and not the person injured by the resistance.—*In re Muse Ali Adam*, I. L. R., 2 Bom., 653.

The fact that an accused person has been sent up by the police does not prevent an offence which is legally compoundable from being compromised under s. 345, *supra*.—*Empress* v. *Nowab Jan*, I. L. R., 10 Calc., 551. This chapter only refers to summons-cases. See *Somu* v. *Reg.*, I. L. R., 6 Mad., 316.

A District Magistrate has no jurisdiction to revive a charge which a Deputy Magistrate has allowed to be withdrawn.—*Reg.* v. *Zoohurul Huq*, 25 W. R., Cr., 64. See *Empress* v. *Nowab Jan*, I. L. R., 10 Calc., 551. See notes to s. 253, *post*.

As to compoundable offences, see s. 345, *infra*.

249. In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class, or, with the previous sanction of the District Magistrate, any other Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

Power to stop proceedings when no complainant.

This section is new.

250. If, in any case instituted upon complaint, a Magistrate acquits the accused under section 245 or section 247, and is of opinion that the complaint was frivolous or vexatious, he may, in his discretion, by his order of acquittal, direct the complainant to pay to the accused, or to each of the accused, where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit.

Frivolous or vexatious complaints.

The sum so awarded shall be recoverable as if it were a fine: Provided that, if it cannot be realized, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs.

Recovery of compensation.

At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

Act X of 1872, s. 209, paras. 1 and 2; Act IV of 1877, s. 242. The last clause is new. It is to be observed that s. 209 of Act X of 1872, applied only to the dismissal of a complaint; but reading that section with s. 212 of the same Act, the Court held, that compensation might be awarded on an order for acquittal.—*Mona Sheikh* v. *Ishan Bardhan*, I. L. R., 6 Calc., 581.

Ch. XX s. 250 No appeal lies from an order under this section. See Chap. XXXI: and see *Mad. H. C. Pro.*, *22nd Nov.* 1879, *Weir*, p. 5.

For form of warrant of imprisonment on failure to recover amends by distress, see Sched. V, No. 30.

As to the mode of recovering compensation, see ss. 386, 387, *infra.*

The special provisions of this section are applicable only in the case of original trials under this chapter. See *Proceedings*, *14th Feby.* 1873, *27th Feb.* 1875 (8 *Mad. H. C. R.*, Appx., vii), *and* 18*th Feb.* 1879; and *Reg.* v. *Ramji Valad Daji*, 5 Bom. H. C. R., Cr., 12; *In re Gurningapa*, 7 Bom. (Crown Cas.), 58; *Radhanath Panja* v. *Wooma Churn Chowdhry*, 22 W. R., Cr., 12.

A case instituted by the police on a complaint to them is not instituted upon complaint within the meaning of this section, and accordingly an order in such a case awarding compensation is illegal.—*In re Ishri* v. *Bakhshi*, I. L. R., 6 All., 96. That was a case in which a complaint was made to the police that five men had forcibly prevented the complainant from driving to the pound certain cattle which had been trespassing, thereby committing an offence under s. 24 of Act I of 1871. The police made an inquiry and sent up the five persons accused for trial.

So, where a complaint having been made to the police, the Magistrate took cognizance of the case upon receiving a charge-sheet against the accused sent in by the police, it was held no compensation could legally be awarded under this section, as there was no complaint as defined by s. 4 (*a*), and the case was not "instituted upon complaint."—*Empress* v. *Polaranapa*, I. L. R., 7 Mad., 563.

A complaint may be both frivolous and false. The award of compensation for making a frivolous complaint does not preclude the Magistrate who makes it from subsequently sanctioning a prosecution for making a false complaint.—*Mad. H. C. Pro.*, *12th Nov.* 1875, *Weir*, p. 5. He may make an order directing the complainant to make amends to the accused, notwithstanding that the complainant is to take his trial for perjury.—*Reg.* v. *Roopun Rae*, 15 W. R., Cr., 9; (S. C.) 6 B. L. R., 296. The whole or any part of any fine recovered may be ordered to be applied in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit.—*S. 545, post.*

A complaint may of course be well founded as regards some of the defendants and yet vexatious and frivolous as regards others and compensation may be ordered to be paid to those as regards whom it is frivolous or vexatious.—*Number* v. *Ambu*, I. L. R., 5 Mad., 381.

When several distinct charges are made, in respect of some of which compensation can, and in respect of the others compensation cannot, be awarded, the Magistrate may, in dismissing the charges, award compensation.—*Modhoosoodun Ghose* v. *Joyram Hazrah*, 13 W. R., Cr., 39. But see *Gunamansee* v. *Haree Dutta*, 18 W. R., Cr., 6, where an award of compensation was set aside as illegal in a case of criminal force and theft or robbery, because the charge was in part one of theft or robbery, and because criminal force really was used to the complainant.

In a case where more than one person has been accused, the Magistrate may award compensation not exceeding Rs. 50 to each person.—*Bhyroo Lall, Petr.*, 14 W. R., Cr., 75.

Compensation cannot be awarded in a case of wrongful confinement (*Jharu* v. *Bahar Ali*, 7 W. R., Cr., 11), or of house-breaking by night or theft (*Dhurai Noshyo* v. *Hubee Noshyo*, *ibid*, 12); nor can it be awarded to a defendant for a frivolous charge of theft.

A Magistrate, in making an order for compensation, is ordinarily bound, if the amount be not paid, to proceed to the recovery of it by distress and sale of the moveables of the person ordered to pay; but if such person admits that he has no goods and thereby waives the right to have the amount levied by distress, the Magistrate may proceed to imprison him in the civil jail. The warrant of distress cannot have currency simultaneously with the imprisonment, because the alternative permitted in case of failure to realize has already been adopted.—*Bisheshwar Shaha* v. *Bishwambhur Sircar*, 23 W. R., Cr., 64.

A Magistrate cannot exceed the amount mentioned in the Code, and he can only award that any sum not exceeding that amount be paid to the accused by way of compensation; he cannot impose it as a fine, otherwise than in compensation, and he cannot directly sentence the complainant to imprisonment in default of payment.

The amount awarded is recoverable by distress and sale of the complainant's property, and in default of such distress, by imprisonment of the complainant.—*Reg.* v. *Gopal*, 2 All., 430.

Compensation under s. 250 can only be given in summons-cases.—*Reg.* v. *Yellappa Bin Mudhappa*, 1 Bom. H. C. R., 181. See *Somu* v. *Reg.*, I. L. R., 6 Mad., 316.

An illegal seizure of cattle under colour of the Cattle Trespass Act, 1871, not having been constituted an offence under that Act or otherwise, an award of compensation under this section of the Code to the accused on such complaint is illegal. —*Pitchi* v. *Ankappa*, I. L. R., 9 Mad., 102.

Compensation cannot be directed to be given by order under s. 119, *supra*, where there is no evidence on which the Magistrate can direct security to be given.—*Jey Singh* v. *Kanhya*, Panjab Rec., 1884, p. 72.

A *karkun* on the establishment of a Civil Court, entrusted with the execution of a writ, reported to the Court that a particular person obstructed him in attaching property as commanded by the writ; and a report was thereupon made by the Court to a Magistrate with a view to proceedings being taken against the obstructor. The Magistrate acquitted the accused, and ordered the accused compensation under s. 209 of Act X of 1872. The Bombay High Court said that the order for compensation was wrong, the *karkun* not being a complainant within the meaning of the section. In such case the Judge of the Civil Court should have been regarded as the complainant, and having acted judicially he was not liable to a penalty.—*In re Keshav Lakshman*, I. L. R., 1 Bom., 175.

The fact that the accused has been tried and acquitted is no bar to the award of compensation.—*Number* v. *Ambu*, I. L. R., 5 Mad., 381.

CHAPTER XXI.

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

Procedure in warrant-cases.

251. The following procedure shall be observed by Magistrates in the trial of warrant-cases.

Act X of 1872, s. 213.

In the investigation of a complaint which forms the subject of two distinct charges arising out of the same transaction, one of which is a summons-case and the other a warrant-case, the procedure to be adopted is that prescribed for warrant-cases.—*Rajnarain Koonwar* v. *Lala Tamoli Raut*, I. L. R., 11 Calc., 91.

A warrant-case is a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months.—*S.* 4 (*s*), *supra*.

Evidence for prosecution.

252. When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution.

The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

The first paragraph corresponds with s. 190 of Act X of 1872, the last with s. 362, para. 1, of the same Act. See also Act IV of 1877, s. 143, para. 1, and the notes to s. 208, *supra*.

Ch. XXI s. 252 This section directs that the Magistrate *shall* proceed to hear the complainant and take all such evidence as may be produced. Where, therefore, in a warrant-case, the complainant and his witnesses were present, a Magistrate without examining them discharged the accused on the report of a Police-officer, it was held, that the order of discharge was illegal.—*Meer Azeem Ali* v. *Hurnam Dass*, 24 W. R., Cr., 9. The last clause of s. 253, which is new, however, allows a Magistrate now, if he considers the charge groundless, to discharge an accused person before examining the complainant and his witnesses; but, if he does so, he must record his reasons for doing so.

As to taking evidence, see further notes to next section.

For form of summons to witnesses, see Sched. V, No. 31.

"When a prisoner is once arrested under a warrant, he should be brought up promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody, or to remand him to prison, without some reason made manifest to him either in the shape of sworn testimony given before him, or in some other form which can be put upon the record and which is sufficient to justify him in sending the prisoner to prison, there to be detained for a limited period before further examination—a period which is never in any case to exceed fifteen days."—*In re Abdool Kadir*, 11 B. L. R., Appx., 11; *Manikam* v. *Queen*, I. L. R., 6 Mad., 63. As to remand, see also s. 344, *post; Ponnusami Chetti* v. *Queen*, I. L. R., 6 Mad., 69.

Section 496, *infra*, deals with the taking of bail for the appearance of the accused.

Chapter XXV (ss. 353-357) deals with the mode of taking and recording evidence in inquiries and trials. The taking of evidence by Presidency Magistrates is specially provided for by s. 362, *post.*

Section 340 provides that every person accused before a Criminal Court may of right be defended by a pleader. (As to what persons are included in the term 'pleader,' see s. 4 (*a*) and the Legal Practitioners' Act, XVIII of 1879, amended by Act IX of 1884.)

Section 495 provides for the conduct of the prosecution by pleaders or other persons empowered or permitted to conduct the prosecution.

The following circular has been issued by the Calcutta High Court as to the examination of complainants and witnesses.—As regards the examination of complainants, witnesses, or persons accused of the commission of any offence under inquiry or trial before a Criminal Court, the following rules should be strictly observed in every case by Magistrates and Sessions Judges:—

(*a*.) Every witness shall be examined *viva voce* in open Court.

(*b*.) A Magistrate or Judge shall not be engaged in any other business whilst the examination of a witness is going on, or whilst any documentary evidence is being read.

(*c*.) If, after the examination of a witness has commenced, the Magistrate or Judge is compelled to attend to any other business, the examination of the witness shall be suspended as long as such other business is being attended to.

(*d*.) The examination of a witness shall not be interrupted for the purpose of enabling the Magistrate or Judge to attend to other business unless such business is of an urgent nature.

(*e*.) It shall be the duty of every Appellate Court subordinate to the High Court to examine the memorandum of the evidence made by the subordinate Court, and to report to the High Court cases in which it shall appear that the above rules have not been strictly and properly attended to.

(*f*.) The evidence of every witness shall invariably be recorded in the presence of the officer who may decide the case, except in the cases provided for by ss. 349 and 350 of the Code of Criminal Procedure, in which the recalling and re-examination of the witness is optional with the superior Magistrates.

(*g*.) After the examination of witnesses has commenced, the trial or preliminary inquiry under Chap. XV of the Code of Criminal Procedure should be proceeded with until all the witnesses in attendance have been examined, those for the prosecution being first examined; and if any witness be detained for a longer period than two days, the Magistrate should record a memorandum, stating the reasons of such detention.

(*h*.) When it is deemed necessary to adjourn the hearing of a case, the adjournment shall be for as short a time as possible, and no person accused of any offence shall be remanded for any period exceeding fifteen days.—*S.* 344, *C. C. P.*

(*i*.) Every Sessions Judge and Magistrate shall sit daily and punctually at the hour appointed for the opening of his Court, unless prevented by circumstances which are to be recorded in the proceedings of the Court.—*Calc. H. C. C. O., No.* 6 *of* 16*th May* 1864, *Wilkins*, pp. 6 and 7.

Duty of the Prosecution.—All persons who are alleged to know or to have knowledge of the facts ought to be brought before the Court and examined.—*Empress* v. *Ram Sahai Lall*, I. L. R., 10 Calc., 1070. See cases cited under this head in notes to ss. 244 and 492.

253. If, upon taking all the evidence referred to in section 252, and taking such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

Discharge of accused.

Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Compare Act X of 1872, s. 215, and Expl. III.

Evidence to be taken.—The last clause of this section is new. Under the former Code, an order of discharge could not be passed until the evidence of all the witnesses named for the prosecution had been taken (*Soondur Lukur* v. *Ramkumar Sirdar*, 20 W. R., Cr., 67 ; *Queen* v. *Parasurama Naikar*, I. L. R., 4 Mad., 329 ; *Sreenath Mundle* v. *Sreeram Rajput*, 24 W. R., Cr., 62), including that of the complainant himself.—*Meer Azim Ali* v. *Hurnam Dass*, 24 W. R., Cr., 9.

It is not incumbent on the Magistrate to *summon* every person named as a witness by the complainant, for this section must be read with the previous one, which vests a discretionary power in the Magistrate as to summoning witnesses. See *Jeldhari Singh* v. *Shankur Doyal*, 23 W. R., Cr., 9. But a Magistrate should not refuse to examine witnesses, because their evidence will be to the same effect as that already taken for the prosecution. — *Empress* v. *Hematulla*, I. L. R., 3 Calc., 389 ; *Empress* v. *Kashi*, I. L. R., 2 All., 447.

Where a complaint has been made before a Magistrate, it was held in Calcutta under the Code of 1872, that it was illegal to sanction a prosecution against the complainant, under s. 211 of the Indian Penal Code for making a false charge, without examining all the witnesses whom the complainant in the original case wished to produce.—*In re Biyogi Bhagat*, 4 C. L. R., 134 ; *In re Russick Lall Mullick*, 7 C. L. R., 382 ; *Empress* v. *Kirimdad*, I. L. R., 6 Calc., 496 ; (S. C.) 7 C. L. R., 467 ; *In re Sukhina Bibi*, 8 C. L. R., 387 ; (S. C.) I. L. R., 7 Calc., 87 ; *In re Chukradhar Potti*, 8 C. L. R., 289. See *In re Gyan Chunder Roy* v. *Protap Chunder Das*, I. L. R., 7 Calc., 208 ; (S. C.) 8 C. L. R., 267 ; *Syed Nissar Hossain* v. *Ramgolam Singh*, 25 W. R., Cr., 10.

The proviso to s. 253 has made an alteration in the law as it was under s. 215 of Act X of 1872, by allowing, in warrant-cases, a Magistrate, for reasons to be recorded, to discharge an accused without examining all the witnesses produced by the complainant. The insertion of this proviso appears to get over the cases of the Calcutta High Court cited, but apparently it would now be necessary to hold a preliminary inquiry under s. 476 before granting sanction to prosecute. See *Empress* v. *Bhawani Prosad*, I. L. R., 4 All., 182 ; *Empress* v. *Abdul Hasan*, 1 All., 497 ; *Queen* v. *Surbhanna Gaundan*, 1 Mad. H. C. R., 30—cases under the Code of 1872, which allowed the procedure suggested even under that Code where the accused had not been prejudiced.

See further the notes to ss. 195, 200, 203, 206, and 209, *supra*.

Ch. XXI s. 254 Section 259, *post*, provides that in warrant-cases, "when the proceedings have been instituted on complaint and upon any day fixed for the hearing of the case the complainant is absent and the offence may be lawfully compounded, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at time before the charge has been framed, discharge the accused."

The High Court at Calcutta (PRINSEP and O'KINEALY, JJ.) held, that the Magistrate was not competent to dismiss a non-compoundable warrant-case because of the absence of the complainant. They expressed an opinion that in warrant-cases not coming within s. 259, a Magistrate, except in cases coming within the last clause of s. 253, is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant.—*Govindu Dass* v. *Dulall Dass*, I. L. R., 10 Calc., 67; (S.C.) 13 C. L. R., 408.

No charge.—Where no charge in writing has been drawn up and the prisoner has not been asked to make his defence, the Magistrate, if he thinks that no offence has been proved, can only discharge, and not acquit, the prisoner.—*Queen* v. *Sheriff*, 6 W. R., Cr., 13; see also *Queen* v. *Bipro Doss*, 8 W. R., Cr., 45, and *Jagabandhu Myti* v. *Goberdhan Bera*, 4 B. L. R., App. Cr., 1. See *Taba* v. *Hira Singh*, Panjab Rec., 1883, p. 76.

Effect of discharge.—The discharge by the Magistrate is not final like an acquittal, and the Sessions Judge may order the accused to be put upon his trial notwithstanding his discharge by the Magistrate. —*In re Shoodun Mundle*, 5 W. R., Cr., 58.

If a prisoner has been discharged by a Subordinate Magistrate, and the District Magistrate considers that the order of discharge was improper, he cannot, if no further evidence against the accused is procurable, revive the proceedings before the Subordinate Magistrate; the only course for him to adopt is to refer the proceedings for the opinion of the High Court.—*In re Mohesh Mistree*, I. L. R., 1 Calc., 282, where the case of *Sidya-bin Satya*, quoted in Prinsep's Criminal Procedure Code, 5th Edn., was dissented from. See also *Empress* v. *Gowadapa-bin Venkugowda*, I. L. R., 2 Bom., 534, and *Queen* v. *Venguvayyangar*, I. L. R., 6 Mad., 25. See notes to ss. 435 and 436, *infra*. A District Magistrate cannot revive before himself proceedings against an accused who has been discharged (*Empress* v. *Donnelly*, I. L. R., 2 Calc., 405); but if further evidence is available, the proceedings may be revived.—*Empress* v. *Donnelly*, I. L. R., 2 Calc., 405; *Ishen Chunder Kurmokar* v. *Hurry Doyal Kurmokar*, 3 C. L. R., 263.

The District Magistrate has no power to revive a prosecution in a case where the accused has been improperly discharged under this section by a Magistrate having jurisdiction to try the case (*Queen* v. *Venguvayyangar*, I. L. R., 6 Mad., 25); where there has been a full inquiry by a competent Court, and the accused has been discharged, a District Judge has no power under s. 437, *post*, unless further evidence has been disclosed, to direct a further inquiry.—*Jeebun Kisto Ray* v. *Shib Chunder Das*, I. L. R., 10 Calc., 1027; but see *Empress* v. *Papadir*, I. L. R., 7 Mad., 454.

Where a Magistrate, after examining the witnesses for the prosecution and the accused themselves, took evidence for the defence without having drawn up a charge against them, and finally, finding the offence not proved, ordered them to be discharged under this section, it was held that the order was contrary to law and most unfair to the accused, and ought to have been treated as an order of acquittal under s. 458, *post*.—*Taba* v. *Hira Singh*, Panjab Rec., 1883, p. 76.

Legally, and for the purposes of a commitment, the Magistrate and Joint Magistrate have equal powers, and the Joint Magistrate is not bound to act upon the instructions of the Magistrate in a judicial proceeding, such as the commencement of a preliminary inquiry.—*Reg.* v. *Tilkoo Goala*, 8 W. R., Cr., 61.

Charge to be framed when offence appears proved.

254. If, when such evidence and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent

In the case of an offence exclusively by Magistrates, "a magistrate has no power to commit the accused to be tried by the sessions court, unless he thinks he cannot pass an ad[illegible] [illegible] punis[illegible]

[illegible]

[illegible] 414.

to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused. Ch. XXI s. 255

Act X of 1872, s. 216, omitting Expls. I and II; Act XI of 1874, s. 16; Act IV of 1877, ss. 116, 122.

A Magistrate is not confined to the charges contained in the complaint, and where a proper complaint has been made to him, if, on evidence, he finds that an offence different from that expressly charged has been committed, he has power to inquire and proceed against the accused with regard to the other offence. — *Reg.* v. *Dhondu Ramchandra*, 5 Bom. H. C. R., Cr., 100. When a Magistrate finds, in the course of an investigation, that the facts disclose an offence other than, or in addition to, that complained of, he is bound to adjudicate on the original charge, and should not dismiss it with leave to the prosecution to institute a fresh and more comprehensive complaint.—*Degumber Paul* v. *Kally Doss Dutt*, 8 W. R., Cr., 82.

Where a Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him, it was held by PEARSON, J., that the omission did not invalidate the order of acquittal and render the order equivalent merely to an order of discharge.—*Empress* v. *Gurdu*, I. L. R., 3 All., 129.

It is *primâ facie* the duty of the prosecutor to call all the persons as witnesses who are shown to be connected with the transaction connected with the prosecution, and who must be able to give material information. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution, and the only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. No corresponding inference, it must be borne in mind, could be drawn against the accused.—*In re Dhunnoo Kazi*, I. L. R., 8 Calc., 121; *Empress* v. *Ram Sahai Lall*, I. L. R., 10 Calc., 1027. See notes to ss. 244 and 492.

It has been laid down by the Madras High Court, that it is not necessary for a Magistrate before preparing a charge under this chapter to examine more witnesses than are sufficient to convince him of the truth of the charge, and with that view it is competent to him to put questions under ss. 193 and 342 of Act X of 1872 (s. 342 of this Code) to the accused. The answers given to these questions, if any are given, will generally have a great effect upon the question as to the witnesses necessary to be examined on the part of the prosecution; and if, after the complainant has been examined, questions put to the accused elicit answers which leave no doubt as to the commission of the offence, there seems to be no reason why the Magistrate should not then frame the charge and call upon the accused to plead.—*Mad. H. C. Pro*, 16*th Dec.* 1864, *Weir*, p. 45. This ruling of the Madras Court seems to suggest a procedure of a somewhat questionable nature, and appears to be at variance with the spirit of ss. 209, 253, and 342 of this Code. See notes to ss. 253 and 342, *post*, on the examination of accused persons.

255. The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.

Plea.

If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.

As to the first paragraph, see Act X of 1872, s. 217, and Act IV of 1877, ss. 120, 122; and as to the last paragraph, Act X of 1872, s. 237, para. 2, and s. 324.

A Magistrate, when he has prepared a charge against an accused person, is bound to read it to him and to ask him if he wishes to have any witness summoned to give evidence on his behalf before the Sessions Court.—*Queen* v. *Hurnath Roy*, 2 W. R., Cr., 50.

Where a prisoner, on the charge being read and explained to him, pleads guilty, the Judge must record the plea, and not merely record a narrative of

Ch. XXI s. 256 what occurred and of the statements made by the prisoner.—*Galap Dhanook* v. *Empress*, 8 C. L. R., 471; (S. C.) I L. R., 7 Calc., 96. An admission which does not admit all the elements of the charge is not a plea of guilty to the charge.—*Ibid; Queen* v. *Sonaoollah*, 25 W. R., Cr., 23. See *Reg.* v. *Gobardhan Bhuyan*, 4 B. L. R, Appx., 101.

Defence.

256. If the accused refuses to plead or does not plead, or claims to be tried, he shall be called upon to enter upon his defence and to produce his evidence, and shall, at any time while he is making his defence, be allowed to recall and cross-examine any witness for the prosecution present in the Court or its precincts.

If the accused puts in any written statement, the Magistrate shall file it with the record.

Act X of 1872, s. 218; Act IV of 1877, s. 121.

The provision that an accused person while making his defence may be allowed to recall and cross-examine the witnesses for the prosecution has been expressly confined to cases where the witnesses are present in the Court or its precincts, as the power to recall witnesses for the prosecution after they had left the Court was said to have been often abused for the purpose of harassment and delay. The next section, however, directs that an accused person may apply to the Magistrate for process to compel the attendance of any witness (whether he has or has not been previously examined) for the purpose of examination or cross-examination, and that the Magistrate must issue such process, unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice, such ground to be recorded in writing.

Even in warrant-cases, perhaps, the more common practice is for the accused (as he has a right to do—Evidence Act, I of 1872, s. 138) to cross-examine the witnesses for the prosecution after their examination-in-chief. Formerly, where no charge was framed, and where an accused person had reason to suppose that this course might prejudice his defence by showing his hand before the prosecutor had made out a *primâ facie* case, it was usual to ask to be allowed to reserve cross-examination until after the charge had been framed. Now, under ss. 256 and 257, an accused person may refrain from cross-examining the witnesses till after the charge has been framed, and rely upon his right under the latter section to have the witnesses recalled for cross-examination. See *Faiz Ali* v. *Koromodi*, I. L. R., 7 Calc., 28; (S. C.) 8 C. L. R., 325—a case decided under the old Code.

The alteration in the law will thus enable an accused person to reserve his cross-examination, until he is aware, "on the case for the prosecution being closed," of the specific charge against him. Knowing the case against him and the charge he has to meet, he will ordinarily be better able to direct his cross-examination to what on the evidence is material. See s. 289, *post*, as to trials before High Courts and Courts of Session.

The claim to recall the witnesses for the prosecution is very different from the request made by the accused person to summon a witness under ss. 208 and 252.—*Belilios* v. *The Queen*, 19 W. R., Cr., 53.

An accused person has always a right to cross-examine every witness for the prosecution immediately after the examination-in-chief. In trials under this chapter he is further entitled to recall and cross-examine witnesses after the case for the prosecution is closed (*Mad. H. C. Pro.*, 17th *May* 1867, *Weir*, p. 45), provided they are present in the Court or its precincts. When the charge has been framed and the defendant put on his defence, he has a right under this section to have the prosecutor's witnesses recalled for the purpose of cross-examination (*Belilios* v. *The Queen*, 19 W. R., Cr., 53), provided they are within the precincts of the Court. And it is not necessary for the accused

Adjournment for production of evidence — Under S. 25.V.35 [illegible] C. the accused is as of right entitled to an adjournment for the purpose of adducing evidence in defence. [illegible]

to shew that he has reasonable grounds for his application (*Reg.* v. *Amiruddin Fakeer*, 21 W. R., Cr., 29); nor is he precluded from exercising the right by reason of his having cross-examined them before he was put on his defence, or by reason of his not having *suo motu* expressed his wish to do so at the time he was called upon to enter on his defence, and when the witnesses were in attendance in the Court and did not require to be re-summoned. —*Queen* v. *Lall Singh*, 6 All., 270. A witness who has left the precincts of the Court may, if necessary, be re-summoned under the next section. Ch. XXI s. 256

In the case of *The Queen* v. *Lall Mahomed*, 6 All., 284, Turner, J., made the following observations as to the recall of witnesses: "I am of opinion that the Magistrate ought not of his own motion to discharge the witnesses for the prosecution until the accused person has exercised or waived his right of cross-examination. When (as frequently happens) it becomes necessary to summon witnesses for the defence from a distance, and consequently to adjourn the hearing for some days, the necessity of retaining the witnesses for the prosecution must occasion considerable inconvenience to the witnesses and expense to the public. Therefore, the Magistrate should, in all cases before granting an adjournment, inquire of the accused if he desires to exercise his right of recalling the witnesses for the prosecution, or consents to the discharge of any or all of them. If the accused consents to their discharge, and they are discharged accordingly, he is not, in my opinion, entitled to have them re-summoned as a matter of right, but it would be in the discretion of the Magistrate to re-summon them. Whether the Magistrate, before granting an adjournment, called upon the accused to exercise his right of recalling the witnesses for the prosecution, need not now be determined. In the present instance, the Magistrate did not call upon the accused to exerise his right, and there is no sufficient proof that the accused consented to the discharge of the witnesses. He was probably not aware that he had any option in the matter, and therefore it would be an unsound inference from his silence that he consented to it."

An accused person in warrant-cases has an undoubted right to have the witnesses for the prosecution, recalled for the purposes of cross-examination after the charge has been framed against him, unless he has waived that right. He may, no doubt, waive it by express words, and he may waive it by allowing the proper time in the course of this trial to go by without availing himself of the right. As a rule, the proper and convenient time in the course of the trial for the purpose of cross-examination of the witnesses for the prosecution is at the commencement of the accused person's defence. It is obviously expedient that the witnesses for the prosecution, if they are to be cross-examined at all, should, as a rule, be cross-examined before the witnesses for the defence are examined rather than afterwards. Sections 217, 218, and 219 (of Act X of 1872) read together merely lay down that when the charge has been framed upon the footing of the evidence produced by the prosecution, then, and not before, the accused person shall be put upon his defence; that to support this he has the right to adduce the testimony of witnesses and other evidence, and incidental to this right, or rather as a branch of it, he has the right to have the witnesses for the prosecution re-called by the Magistrate in order that he may cross-examine them, and that the Magistrate shall afford the accused the requisite means and opportunity of, in this way, making out his defence by issuing summons to witnesses whether persons who have already been examined or not, and adjourning the trial, &c., when in his discretion it seems necessary to do so. The order in which the testimony of witnesses or other evidence is to be taken, and examination or cross-examination had is, as in all the other judicial trials, left to the discretion of the Magistrate, which ought to be exercised not capriciously, but in such a way as to best ensure simplicity of procedure and a fair trial and to promote the ends of justice. There is not any rigid rule that the only time at which an accused person can ask for the recall of the witnesses for the prosecution is the time when he is called upon to enter upon his defence.—*Khurruckdharee Sing, Petitioner*, 22 W. R., Cr., 44, *per* Phear and Morris, JJ.; and see *Queen* v. *Ram Kishen Halwai*, 25 W. R., Cr., 48.

A Magistrate cannot, at least if they are within the Court or its precincts, refuse to allow witnesses, whom he allowed to be cross-examined by the accused previous to the preparation of a charge, to be re-called and cross-examined after the accused has been put upon his defence under this section. Witnesses so re-called at instance of the accused are still to be treated as witnesses for the prosecution.

Ch. XXI s. 257 —*In re Thakoor Dyal Sen*, 17 W. R., Cr., 51; *Nobin Chand Banerjee, Petitioner*, 25 W. R., Cr., 32; *Talluri Venkayya* v. *The Queen*, I. L. R., 4 Mad., 130.

In the case of *Empress* v. *Baldeo Sahai*, I. L. R., 2 All., 253, the charge having been read to the accused, he stated his defence to the same, upon which the Magistrate, the witnesses for the prosecution being in attendance, called upon the accused to cross-examine them. The accused refused to do so until he had examined the witnesses for the defence, who were not in attendance. The Magistrate then discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence. SPANKIE, J., held, that the accused was not entitled to have the witnesses for the prosecution summoned in order that they might be cross-examined by the accused on the date fixed for the examination of the witnesses for the defence.

Cross-examination of witness called by Court.—Witnesses summoned on behalf of the prosecution, and not called, ought to be placed in the box in order that the defence may have an opportunity of exercising the right of cross-examination, and *à fortiori*, if such witnesses are called and examined by the Court, the accused should be allowed to cross-examine them.—*Empress* v. *Girish Chunder Talukdar*, I. L. R., 5 Calc, 614; (S. C.) 5 C. L. R., 364.

Process for compelling production of evidence at instance of accused.

257. If the accused applies to the Magistrate to issue any process for compelling the attendance of any witness (whether he has or has not been previously examined in the case) for the purposes of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice. Such ground shall be recorded by him in writing.

The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

See Act X of 1872, s. 362, para. 2, and Act IV of 1877, s. 143, para. 2. Compare ss. 208 and 252, *supra*.

The section does not specify at what time the application must be made. It might apparently be made at any time, and, if made *bonâ fide*, the Magistrate would be bound to grant it, requiring, if necessary, a deposit to defray expenses of witness. Under the former Code it was held, that an accused person might abandon his right to have witnesses re-called, and that where he did so, he could not insist on his right.—*Talluri Venkayya* v. *Queen*, I. L. R., 4 Mad., 130; *Reg.* v. *Lall Mahomed*, 6 N. W. P., 284; and *Thakoor Dyal Sen's* case, 17 W. R., Cr., 51. See further cases cited in note to s. 256.

The only grounds on which the Magistrate may refuse the application are those specified in the section.

Where a Magistrate, trying an offence, rejected an application that a certain person might be examined on behalf of the accused either in Court or by commission without recording his reasons for refusing to summon such person as required by s. 362 (of Act X of 1872), the conviction of the accused person was set aside.—*In re Sat Narain Singh*, I. L. R., 3 All., 392. See s. 537, *post*.

In the case of *Deela Mahton*, I. L. R., 6 Calc., 714; (S. C.) 8 C. L. R., 70, on the case on both sides being closed, the Magistrate issued a summons to a witness to give evidence, whereupon the accused filed a petition praying to have certain witnesses summoned to give evidence to rebut that of the witness called by the Magistrate. The petition was refused, no reason being recorded. The High Court, on revision, held, that the Magistrate was bound either to take the evidence or

257. Recalling witnesses for further crossexamina[illegible] after charge – The accused has a right to recall and crossexamine witnesses unless the it be vexatious and delatory or for defeating the ends of justice.
Nilkanta Singh vs. The Queen Empress.
I.L.R 20 C 469

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record his reasons for not doing so, and quashed the conviction. The Court was of opinion that the fact that the accused stated, when the case closed, that he did not wish to examine witnesses then, was no reason for refusing to summon his witnesses to meet fresh evidence taken by the Magistrate himself, after hearing the arguments on behalf of the defence.

A Magistrate, having once granted to the accused processes for attendance of witnesses, is bound to assist the accused in enforcing the attendance of the witnesses.—*Empress* v. *Dhananjoi Chaudhuri*, I. L. R., 10 Calc., 931. There certain witnesses who had been summoned for the accused failed to appear on the day of trial, and the Deputy Magistrate refused to adjourn the hearing or to issue fresh processes for the attendance of the witnesses, on the ground that they were all friends of the accused who might come to Court if the accused desired them, and convicted the accused. The High Court set aside the conviction. See *Gohar* v. *Empress*, Panj. Rec., 1884, p. 48.

In the case of *The Queen* v. *Bholanath Mookerjee*, 7 B. L. R., 564, Ainslie, J., held that, in a trial under Chap. XIV of Act XXV of 1861 (Chap. XXI of this Act), the Magistrate was not bound under s. 253 to summon any witness whom the accused might require. It was only discretionary with him to do so. Paul, J., however, differed, being of opinion that the right of an accused person to have witnesses for his defence summoned during the pendency of his trial was an ordinary and natural right, not taken away, but affirmed by s. 253. The Magistrate was bound to summon the witnesses, though it was discretionary with him to adjourn the trial.

The provisions of the Evidence Act as to examination, cross-examination, and re-examination of witnesses are contained in ss. 138 and 139 of that Act. Witnesses recalled under this section on application of the accused are still to be treated as witnesses for the prosecution.—*In re Thakoor Dyal Sen*, 17 W. R., Cr., 51; *Nobin Chand Banerjee, Petitioner*, 25 W. R., Cr., 32; *Tulluri Venkayya* v. *Queen*, I. L. R., 4 Mad., 130.

258. If in any case under this chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

Acquittal.

If in any such case the Magistrate finds the accused guilty, he shall pass sentence upon him according to law.

Conviction.

Act X of 1872, s. 220, omitting the explanation; Act IV of 1877, s. 126, first half.

As to the procedure to be followed when, after the commencement of an inquiry or trial, the Magistrate finds that the case should be committed, see s. 347, *infra*.

For form of warrant of commitment on a sentence of imprisonment or fine, if passed by a Magistrate, see Sched. V, No. 29.

In every case in which a military officer or a soldier is sentenced by a Criminal Court to a fine of Rs. 200 or upwards, or to imprisonment otherwise than in default of paying a fine not amounting to Rs. 200, the Court shall send a copy of its final order *proprio motu* to the immediate superior of the person convicted. And, whenever a soldier is committed to jail, whether for trial or under sentence, his military rank shall always be stated in the warrant of commitment in order that due notice may be given of the day and hour on which the imprisonment of such person will expire as required by the 33rd section of the Mutiny Act.—*Orders, Govt. of India, No.* 1632, *dated 3rd October* 1871, *and No.* 37—1805, *dated* 31*st October* 1873, *Smyth*, p. 148; see also *Calc. H. C. C. O., No.* 6, *dated* 17*th July* 1871, *Wilkins*, p. 139.

No judgment of acquittal can be recorded unless a charge has been drawn up.—*Reg.* v. *Jupit Ahir*, 22 W. R., Cr., 25.

While an order of acquittal is subsisting, it is not competent to any Court to order a re-trial.—*In re Joja Pushan*, 3 C. L. R., 131; see *Reg.* v. *Venku Narsa* 9 Bom. H. C. R., 170.

Ch. XXI s. 259 If a prisoner is convicted, the Magistrate is bound to pass some sentence, however slight. The power of remitting sentences is reposed solely in the Government, and the Magistrate acts wholly without authority in warning and discharging a prisoner after he has been convicted.—3 W. R., C. L., 15.

In the case of a conviction of house-breaking by night in order to commit theft, it was held that there may be either one sentence for both offences not exceeding that which may be given by the law for the graver offence, or separate sentences for each offence, provided that in the aggregate the punishment awarded does not exceed that which may be given for the graver offence.—*Reg.* v. *Tukaya bin Tamana*, I. L. R., 1 Bom., 214; see *Reg.* v. *Gulam Abas*, 12 Bom. H. C. R., 147. But see the case of *Noujan*, 7 Mad. H. C. R., 375, and *Queen* v. *Mungroo*, 6 N. W. P. H. C. R., 293, and the more recent cases cited in the notes to s. 235, *supra*.

As to the sentences which may be passed by Courts of various classes, see ss. 32 to 35, *supra*, pp. 23 and 27.

An order dismissing a complaint in a warrant-case under this section amounts to an acquittal.—*In the matter of Jadubar Mookerjee*, 5 C. L. R., 359.

Court-fees.—Where a complainant is required to pay fees or expenses for summoning witnesses under this section and fails to do so, the Magistrate must deal with the case on the evidence before him, and is not justified in dismissing the complaint under s. 247, *supra.*—*In re Korapulu* v. *Monappa*, I. L. R., 5 Mad., 160.

In non-cognizable cases, applications or petitions containing a complaint or charge of any offence are chargeable with a fee of 8 annas.—*Court Fees Act, VII of 1870, Sched. II-i (b)*. Under s. 18 of the Act, where the application is made verbally, and the examination of the complainant is reduced to writing, a like fee must be paid. Section 31 provides that, on conviction of the accused person, the Court shall, in addition to the penalty imposed upon him, order him to repay to the complainant the fee paid on the petition or application, or in the examination of the complainant, &c., and also the fees paid by complainant for serving processes. Fees so ordered to be repaid are to be recovered as if they were fines.

259. When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

Absence of complainant.

Act X of 1872, s. 215, Expl. I. Contrast Act IV of 1877, ss. 118, 133.

As to what offences may be lawfully compounded, see s. 345, *infra*.

A Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant in warrant-cases not coming within this section, except in cases coming within the last clause of s. 253, *supra*.—*Govinda Dass* v. *Dulall Dass*, I. L. R., 10 Calc., 67; 13 C. L. R., 405.

A case having been transferred from the file of one Magistrate to that of another was, on the day fixed, called on for hearing, but the complainant not appearing, the case was dismissed under this section. It appeared that the complainant and his witnesses, though not in attendance in the Magistrate's Court, were present in another Court in the same courthouse, the complainant being under the impression that his case had been transferred to the Magistrate of that Court. PRINSEP and TOTTENHAM, JJ., treated the case as if the complainant had been present in Court, holding that, under the circumstances, the provisions of the section had been improperly applied.—*In re Romanath Bal* v. *Behari Bag Bagdi*, 13 C. L. R., 303.

Where a complainant is required to pay fees or expenses for summoning witnesses under s. 244 and fails to do so, the Magistrate must deal with the case on the evidence before him, and is not justified in dismissing the complaint under this section.—*In re Korapulu* v. *Monappa*, I. L. R., 5 Mad., 160. As to fees and processes in non-cognizable cases, see note to s. 244, *supra*.

A Magistrate, it was held, was not bound, before acquitting a person under this section, to wait till the Court is about to close for the day to give an absentee complainant an opportunity of appearing.—*Kuttiyali* v. *Pari Makri*, I. L. R., 7 Mad., 356. See *Rangasami Ayyanga* v. *Narasimhulu*, I. L. R., 7 Mad., 213. Ch. XXII s. 260

See *Empress* v. *Nowab Jan*, I. L. R., 10 Calc., 551. As to procedure in absence of complainant in summons-cases, see s. 247, *supra*.

CHAPTER XXII.

OF SUMMARY TRIALS.

This chapter does not apply to Presidency Magistrates. The procedure of such Magistrates as to the taking of evidence is regulated by s. 362, *post*, which provides that in every case in which a Presidency Magistrate imposes a fine exceeding Rs. 200, or imprisonment for a term exceeding six months, he shall either take the evidence in his own hand, or cause it to be taken down in writing from his dictation in open Court.

Power to try summarily.

260. Notwithstanding anything contained in this Code,

(1) the District Magistrate,

(2) any Magistrate of the first class specially empowered in this behalf by the Local Government, and

(3) any Bench of Magistrates invested with the powers of a Magistrate of the first class and specially empowered in this behalf by the Local Government may try in a summary way all or any of the following offences :—

(*a*) Offences not punishable with death, transportation or imprisonment for a term exceeding six months ;

(*b*) Offences relating to weights and measures, under sections 264, 265, and 266 of the Indian Penal Code ;

Section 264 of the Penal Code relates to the fraudulent use of a false instrument for weighing; s. 265, to the fraudulent use of false weights or measures; and s. 266, to being in possession of false weights or measures.

(*c*) Hurt, under section 323 of the same Code ;

Section 323 relates to voluntarily causing hurt.

(*d*) Theft, under sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees ;

Section 379 relates to theft; s. 380, to theft in a dwelling-house; s. 381, to theft by a clerk or servant of property in possession of his master.

(*e*) Receiving or retaining stolen property, under section 411 of the same Code, where the value of such property does not exceed fifty rupees ;

Section 411 relates to dishonestly receiving stolen property.

Ch. XXII s. 260 (*f*) Assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed fifty rupees ;

Section 414 relates to voluntarily assisting in the concealment of stolen property.

(*g*) Mischief, under section 427 of the same Code ;

Section 427 relates to committing mischief and thereby causing damage to the amount of Rs. 50. See *Sonai Sardar* v. *Bukhtar Sardar*, 25 W. R., Cr., 46 ; *In re Gamiroollah Sarkar*, I. L. R., 10 Calc., 408.

(*h*) House-trespass, under section 448 of the same Code ;

(*i*) Insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506, of the same Code ;

(*j*) Abetment of any of the foregoing offences ;

(*k*) An attempt to commit any of the foregoing offences, when such attempt is an offence :

Provided that no case in which a District Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way.

Compare Act X of 1872, ss. 222, 223, 224, and as to cl. (*i*), Act XI of 1874, s. 17.

Clauses (*a*), (*f*), and (*k*) are new.

An offender under s. 49 of Act XXI of 1856 (the Bengal Abkaree Act) can be tried summarily, the confiscation provided by s. 49 of that Act being merely a consequence of the conviction and not forming part of the punishment for the offence.—*Empress* v. *Baidanath Das*, I. L. R., 3 Calc., 366 ; (S. C.) 1 C. L. R., 442, overruling *In re Khetter Mohun Chowrunghee*, 22 W. R., Cr., 43, and *Re Jodoo Nath Shaha*, 23 W. R., Cr., 33.

The formalities required by this chapter must be most strictly observed (*Queen* v. *Johrie Singh*, 22 W. R., Cr., 28), and it must clearly appear on the face of the conviction that the case was dealt with as one of those which come under the purview of the section; for instance, if the case be one of theft, it should appear what the value of the property alleged to be stolen really was.—*Queen* v. *Abheen Purrida*, 20 W. R., Cr., 17. In the case above referred to of *Queen* v. *Johrie Singh*, JACKSON, J., said: "In a trial by a Magistrate under a procedure which is most justly called summary, the Legislature has provided a minimum of protection for the person affected by the order; and it appears to us absolutely necessary that officers who act under the 18th chapter of the Code (the corresponding chapter in Act X of 1872) should most strictly observe the scanty formalities which the chapter provides. If they do not do so, it would be absolutely impossible for this Court, as a Court of Revision, or for any other authority, to exercise the smallest control over proceedings which may form the subject of complaint."

District Magistrates should satisfy themselves from time to time that the law regarding summary trials is properly observed, and especially that Magistrates do not exceed their jurisdiction—a duty which may be most conveniently performed by an occasional and not infrequent examination of the registers of summary trials.—*Cal. H. C. C. O., No.* 1, *dated* 11*th January* 1881, *Wilkins*, p. 113.

A charge of mischief, even if combined with one of theft, is triable summarily under this section.—*Queen* v. *Ramaotar Panre*, 25 W. R., Cr., 5.

The question whether a case is to be tried summarily depends on the complaint; the evidence may fail to show that the property is worth more than Rs. 50; but it is the complaint which must determine the mode of procedure.—*Ram Chunder Chatterjee* v. *Kanye Laha*, 25 W. R., Cr., 19. Thus, a Magistrate has no jurisdiction to try

a case summarily when the complaint is of an offence which he could not try even if the evidence shows that the offence committed was one which could be dealt with summarily.—*Dwarkanath Mozoomdar* v. *Nalu Das*, 21 W. R., Cr., 89.

Where the accused was charged with the theft of a box containing Rs. 50 in cash and of the box worth 8 annas 6 pie, the Magistrate considered the box to be of no value and struck out the 8 annas 6 pie, and thereupon tried the case summarily. It was held, that the Magistrate was not at liberty upon his own authority and without taking evidence to throw the box entirely out of consideration, as upon that depended his jurisdiction to dispose of the case summarily. Such evidence should have been taken precisely in the same way as evidence upon the merits of the case, and as it was not so taken, it was held that the Magistrate had no jurisdiction.—*Queen* v. *Buzleh Ali*, 22 W. R., Cr., 65.

The powers conferred upon Magistrates under this chapter were not intended to give them the power of altering a charge brought against an accused person so as to bring his case within the provisions of the chapter, but when a charge of a serious offence, one which the Magistrate is not competent to inquire into summarily, has been regularly preferred, it is the duty of the Magistrate to apply the procedure prescribed for such cases, and either to convict or acquit or commit for trial the person implicated. The procedure under this chapter is to be followed when a charge brought against the accused is plainly and directly one of those specified in this section.—*Chunder Shekhur Thacoor* v. *Nitaloo*, 22 W. R., Cr., 29; and see *Khetter Mohun Chowrunghee*, *ib.*, 43; *Haran Sheikh* v. *Ramdhun Biswas*, 24 W. R., Cr., 21; *Emaral Sheikh* v. *Mohammadi Sheikh*, 24 W. R., Cr., 48.

Splitting Offences.—No Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction over the minor parts of the offence.—*In re Chunder Seekur Sookul* v. *Dhurrum Nauth Tewari*, 1 C. L. R., 434; *Ramanand Mahton* v. *Koylash Mahton*, I. L. R., 11 Calc., 236; *Empress* v. *Abdool Karim*, I. L R., 4 Calc., 18; (S. C.) *In re Abdool Kadir*, 3 C. L. R., 44. Such proceedings are void under s. 530, *infra*. If a charge of an offence not triable summarily is laid and sworn to, the Magistrate must proceed with the case accordingly, unless he is at the outset in a position to show from the deposition of the complainant that the circumstances of aggravation are really merely exaggeration and not to be believed.—*Ib.*

If a Magistrate, not being empowered on that behalf, tries an offender summarily, his proceedings are void.—*S.* 530, *post.*

District Magistrates, as already stated in this note, should satisfy themselves from time to time that the law regarding summary trials is properly observed, and especially that Magistrates do not exceed their jurisdiction—a duty which may most conveniently be performed by an occasional and not infrequent examination of the registers of summary trials.—*C. O. No.* 1 *of* 11*th January* 1881, *Wilkins*, p. 113.

Evidence.—Section 355, *post*, provides that in summons-cases tried before a Magistrate, other than a Presidency Magistrate, and in cases of the offences mentioned in s. 260, cls. (*b*) to (*k*), both inclusive, when tried by a Magistrate of the first or second class, the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record. If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same; and such memorandum shall form part of the record.

In cases where no appeal lies, the Magistrate need not record evidence (s. 263, *post*); but in cases where there is an appeal, he must record a judgment embodying the substance of the evidence (s. 264, *post*).

The Local Government may direct any two or more Magistrates in any places outside the Presidency-towns to sit together as a Bench, and may, by order, invest such Bench with any of the powers conferred or conferrible by or under this Code on a Magistrate of the first, second, or third class, and direct it to exercise such powers in such cases, or such classes of cases only, and within such local limits, as the Local Government thinks fit. Except as otherwise provided by any order under the section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members who is

Ch. XXII s. 260 present taking part in the proceeding as a member of the Bench belongs, and as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class.—*S. 15, supra.*

The following notification, dated the 6th May 1873, was published by the Government of Bengal, respecting Benches of Magistrates in the districts of Dinagepore, Maldah, Rungpore, Chittagong, Tipperah, Dacca, Backergunge, Mymensing, Shahabad, Sarun, Tirhoot, and Kamroop :—

1. Under the direction of the Magistrate of the District, any two or more of the Honorary Magistrates in any district may, in that district, sit as a Bench in company with the Magistrate of the District, or the Subdivisional Magistrate, or any salaried Magistrate, subordinate to the Magistrate of the District, exercising not less than second class powers; and any Bench so constituted is vested with first class powers in respect of offences cognizable by Magistrates of the first class, and with powers of summary trial under s. 222 [s. 260] of the Criminal Procedure Code.

2. Under the special order of the Magistrate of the District, any two Magistrates, honorary or salaried, of whom one is vested with not less than second class powers, may form a Bench with first class powers for the trial of any particular case or class of cases specially referred to them by the Magistrate of the District. Such Bench may also exercise summary powers under s. 222 [s. 260], unless the order of reference is for trial in regular form.

3. Under the direction of the District Magistrate, any one of the Honorary Magistrates of a district may sit with any salaried subordinate Magistrate to form a Bench, and the Bench shall, when so constituted, exercise second class powers in respect of offences cognizable by Magistrates of that class and powers of summary trial under s. 225 [s. 261] of the Criminal Procedure Code, unless any member of the Bench has first class powers, in which case the Bench may also exercise those powers. If the Magistrate of the first class has summary powers under s. 222, the Bench may exercise those powers.

4. Subject to the general orders of the Magistrate of the District, any two or more Honorary Magistrates may, in their respective towns or municipalities, sit together as a Bench for the disposal of offences under Municipal or Town Acts and the conservancy clauses of any Police Act, without the assistance of any salaried Magistrate, and such Bench shall exercise third class powers and powers of summary trial under s. 225 [s. 261] in respect of all cases.—*Calcutta Gazette*, 1873, p. 662.

The Presidency Magistrates are directed, by the Lieutenant-Governor of Bengal, to submit returns showing the working of their Courts to be sent to the Commissioner of Police. See Resolution, 31st December 1872, *Calcutta Gazette*, 1873, p. 29.

Under s. 50 of Act X of 1872, Benches of Magistrates in the towns of Ootacamund and Conoor, in the Nilgiri District, were invested with the powers of a Magistrate of the first class; and, under s. 224, the same Benches were empowered to try summarily all the offences mentioned in s. 222 [s. 260 of the present Code] of Act X of 1872.—*Madras Gazette*, 1875, p. 1204.

By a notification, dated the 1st May 1877, under the provisions of ss. 42 and 223 of Act X of 1872, the Governor of Madras was pleased to confer upon all Subordinate Judges in the Presidency the powers of a Magistrate of the first class in respect to offences generally, together with the power to try summarily all the offences mentioned in s. 222 [s. 260] of the Code, and to invest all District Moonsiffs under s. 42 with the powers of a Magistrate of the first class in regard to offences generally.—*Madras Gazette*, 1877, p. 287.

By a notification in the *Bombay Gazette*, 1873, p. 16, dated 1st January 1873, that portion of the notification of the 14th December 1872 which invested all persons therein appointed to be Magistrates of the first class with the power to try summarily all the offences mentioned in s. 222 of Act X of 1872 (s. 260) was cancelled, and it was notified that such power would in future only be conferred on individual Magistrates who might be specially recommended by a Magistrate of a district for the grant of this particular power. By the same notification, Honorary Magistrates throughout the Presidency were excepted from the delegation of powers mentioned in the notification of the 14th December 1872. And it was notified that the additional power to be conferred thereafter on each Honorary Magistrate would be determined on the receipt of a report from the Magistrate of the District in which such Honorary Magistrate might reside.

In Bengal, any Bench of two or more Honorary Magistrates sitting with a salaried Magistrate exercising not less than second class powers is vested with first class powers.—*Calcutta Gazette*, 1873, pp. 17 and 662. Accordingly, there is no appeal from a sentence passed under this section by such a Magistrates.—*S.* 414, *post; In re Havildar Roy*, I. L. R., 9 Calc., 96. As to appeal, see ss. 414 and 415, *post.*

Power to invest Bench of Magistrates invested with less power.

261. The Local Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences :—

(*a*) Offences against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, and 447 ;

(*b*) Offences against Municipal Acts, and the conservancy-clauses of Police Acts, punishable only with fine, or with imprisonment for a term not exceeding one month ;

(*c*) Abetment of any of the foregoing offences ;

(*d*) An attempt to commit any of the foregoing offences, when such attempt is an offence.

Act X of 1872, s. 225.

(*a*) Section 277 of the Penal Code refers to fouling the water of a public spring or reservoir; s. 278, to making the atmosphere noxious to public health; s. 279, to rash driving or riding on a public way ; s. 285, to negligent conduct with respect to any fire or combustible matter; s. 286, to negligent conduct with respect to any explosive substance; s. 289, to negligence with respect to any animal; s. 290, to public nuisances; s. 292, to sales, &c., of obscene books; s. 293, to the possession of obscene books for sale or exhibition; s. 294, to singing obscene songs; s. 323, to voluntarily causing hurt; s. 334, to voluntarily causing hurt on provocation; s. 336, to rash and negligent acts; s. 341, to wrongful restraint; s. 352, to using criminal force otherwise than on grave provocation; s. 426, to mischief; s. 447, to criminal trespass.

Clauses (*c*) and (*d*) are new.

A Bench of Magistrates, whether empowered under this or the preceding section, can only try the offences mentioned in the section.—*Reg.* v. *Bebheki Pathak*, 21 W. R., Cr., 12. See *In re Havildar Roy*, I. L. R., 9 Calc., 96. If a Magistrate, not being empowered, tries an offender summarily, his proceedings are void.—*S.* 530, *post.*

Procedure for summons and warrant-cases applicable.

262. In trials under this chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as hereinafter mentioned.

Limit of imprisonment.

No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this chapter.

Act X of 1872, s. 226.

This section applies only to substantive sentences of imprisonment.—*Empress* v. *Asghur Ali*, I. L. R., 6 All., 61. In that case the accused was summarily tried by a Magistrate for embezzlement of opium, convicted and sentenced to pay a fine

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of Rs. 60, or in default to suffer four months' imprisonment in the civil jail. The Sessions Judge referred the matter to the Allahabad High Court, on the ground that, in his opinion, having regard to ss. 33 and 262 of this Code, the Magistrate could not inflict more than three months' imprisonment in default of payment of the fine. TYRRELL, J., said: "In cases of simple imprisonment ordered as a process for the enforcement of payment of fine, the general rules of ss. 32 or 33 are applicable, and the principle of s. 67 of the Indian Penal Code (read with Act VIII of 1882) is unaffected by Chap. XXII of Act X of 1882."

It is not illegal to impose solitary confinement as part of the sentence in a case tried summarily. The effect of this section is only to limit the imprisonment to a term of three months. It does not interfere with a Court's powers under s. 73 of the Penal Code to order solitary confinement, or with the similar powers given by s. 32 (*a*) of this Code.—*Per* OLDFIELD, J., *Empress* v. *Annu Khan*, I. L. R., 6 All., 83.

The procedure prescribed for the trial of summons-cases and for warrant-cases respectively is contained in Chaps. XX and XXI. As to the manner in which the evidence is to be taken or recorded, see ss. 263, 264, 355, *post*.

If a Magistrate, not being empowered on that behalf, tries an offender summarily, his proceedings are void.—*S.* 530, *post*.

Record in cases where there is no appeal.

263. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the Local Government may direct the following particulars:—

(*a*) the serial number;

(*b*) the date of the commission of the offence;

(*c*) the date of the report or complaint;

(*d*) the name of the complainant (if any);

(*e*) the name, parentage and residence of the accused;

(*f*) the offence complained of and the offence (if any) proved, and in cases coming under clause (*d*), clause (*e*) or clause (*f*) of section 260, the value of the property in respect of which the offence has been committed;

(*g*) the plea of the accused and his examination (if any);

(*h*) the finding and, in the case of a conviction, a brief statement of the reasons therefor;

(*i*) the sentence or other final order; and

(*j*) the date on which the proceedings terminated.

Act X of 1872, s. 227. The clause of s. 227 providing that the Magistrate need not record his reasons for passing his judgment, which was inconsistent with cl. (*h*), has been omitted. See *In re Dowlat Singh*, 6 C. L. R., 273.

As to when an appeal lies, see Chap. XXXI, *post*.

Where there is an appeal, the record cannot be made up in the manner described by this section (*In re Sher Mahomed*, 2 C. L. R., 511); and the Magistrate is bound to record a brief statement of his reasons for convicting an accused.—*In re Rohoinath Shaha*, I. L. R., 8 Calc., 195.

The record must be written by the Magistrate. He is not authorized to depute that duty to a clerk, nor to affix his signature to the record or judgment by a stamp.—*Subramanya* v. *Queen*, I. L. R., 6 Mad., 396.

(k). A magistrate in recording his reasons for a conviction, must state them so that the High Court on revision may judge whether there were sufficient materials before him to support the conviction.
Empress v. Panjubling I. L. R. 6 Cal 579 followed.
Queen Empress v. Shidgauda I. L. R. 18 Bom 97.

Under cl. (*h*), although a Magistrate is not required to record any evidence. he should, in recording his reasons for the conviction, so state them, that the High Court, on revision, may judge whether there were sufficient materials before him to support the conviction.—*In re Punjab Singh*, I. L. R., 6 Calc., 579. In that case the reasons were not so stated, and the High Court, on motion, set the conviction aside.

The final order or judgment in warrant-cases tried summarily, when a conviction is not made, should invariably show whether the accused person has been discharged or acquitted, the test being whether, after hearing the evidence for the prosecution, the Court has called upon the prisoner to plead to a definite charge or not.—*Smyth*, p. 102.

See ss. 355, 356, and 364, *post*, as to cases in which the Magistrate must make a memorandum of the evidence. The provisions of s. 364 as to the recording of the examination of accused persons are by that section declared not to apply to the examination of an accused under this section. In examining an accused person, however, in summary trial, the Magistrate must be guided by s. 342, *post.*

A Magistrate, trying an offence summarily and passing a sentence from which an appeal lies, should not make the record required by s. 264 of the Code of Criminal Procedure as an entry in the register prescribed by s. 263; and then, on the Appellate Court calling for the record of the trial, cut out and send up the portion of the register containing this entry. The practice of mutilating official registers is open to the gravest objection, and is strictly prohibited; there is no warrant for it in the law. Section 263 of the Code of Criminal Procedure directs that a register shall be kept for a certain purpose, namely, for the purpose of entering such particulars as are specified in the section, *in cases where no appeal lies*. The provisions of this section do not apply to any other cases.—*C. O. No.* 3, 8*th July* 1876, *Wilkins*, p. 113.

District Magistrates should satisfy themselves from time to time that the law regarding summary trials is properly observed, and specially that Magistrates do not exceed their jurisdiction—a duty which may most conveniently be performed by an occasional and not infrequent examination of the register of summary trials.—*C. O. No.* 1, 11*th January* 1881, *Wilkins*, p. 113.

264. In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

Record in appealable cases.

Such judgment shall be the only record in cases coming within this section.

Act X of 1872, s. 228.

A Magistrate is not bound to record the substance of every separate deposition, but to state generally what is the substance of the witnesses' evidence.—*Kristodhone Dutt* v. *The Chairman of the Municipal Commissioners*, 25 W. R., Cr., 6.

In the case of *Reg.* v. *Kheraj Mullah*, 11 B. L. R., 33; 20 W. R., Cr., 13, it was held that, if, on appeal from a summary trial under this chapter, the evidence before the Judge is not sufficient to reasonably satisfy him that the prisoner has been rightly convicted, he ought to acquit him.

In the more recent case of *Empress* v. *Karan Singh*, I. L. R., 1. All., 680, the Court of Session quashed a conviction, on the ground merely that the substance of the evidence on which the conviction was had was not embodied in the Magistrate's judgment. It was held that the Court of Session should not have quashed the conviction merely by reason of such defect; but, if it found it impossible to dispose of the appeal because of such defect, it should have required the Magistrate to repair the same by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examine the witnesses for that purpose, or to have ordered a re-trial with that view.

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As to whether an appeal will lie, see Chap. XXXI and particularly ss. 407, 414. An appeal lies under s. 407 from a conviction by a Bench of Magistrates invested with second or third class powers.—*Empress* v. *Narayanasami*, I. L. R., 9 Mad., 36. See note to s. 414, *post.*

The judgment required to be drawn up in *appealable cases* under s. 264 is to contain the particulars mentioned in s. 263 and something more, namely, the substance of the evidence on which the conviction was had. But it is not to be entered in the *register of non-appealable cases*, and is evidently intended to be in a separate form, so that, when necessary, it may be submitted to the Court of Appeal.—*C. O. No.* 3, *8th July* 1876, *Wilkins*, p. 113.

Language of record and judgment.

265. Records made under section 263 and judgments recorded under section 264 shall be written by the presiding officer either in English or in the language of the Court, or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother-tongue.

Bench may be authorized to employ clerk.

The Local Government may authorize any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings.

Act X of 1872, ss. 229, 230.

Inspection of registers of summary trials.—District Magistrates should satisfy themselves from time to time that the law regarding summary trials is properly observed, and especially that Magistrates do not exceed their jurisdiction—a duty which may most conveniently be performed by an occasional and not infrequent examination of the registers of summary trials.—*Calc. H. C. C. O., No.* 1 *of* 11*th January* 1881, *Wilkins*, p. 113.

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

A.—Preliminary.

'High Court' defined.

266. In this chapter, except in sections 276 [Act X of 1886, s. 8], 307, the expression 'High Court' means a High Court of Judicature established or to be established under the twenty-fourth and twenty-fifth of Victoria, chapter 104, and includes the Chief Court of the Punjab, and such other Courts as the Governor-General in Council may, by notification in the *Gazette of India*, declare to be High Courts for the purposes of this chapter.

Act X of 1875, s. 3.

See s. 4 (*i*), *ante*, p. 5, as to the meaning of 'High Court' when used elsewhere in this Code than in this chapter.

268. Statement of deceased person not proved before Assessors, material irregularity — Where in a trial for murder held with assessors the Court relied on a statement made by the deceased, and the evidence necessary to prove such a statement was not recorded until after the close of the trial and the discharge of the assessors. Held that this amounted to a material irregularity which was not covered by § 537 Cr. P. Code.

Queen Empress v. Ramlal I. L. R. 15 All 136

Amended by § 1. Act XIII of 1896.

After the 1st sentence of § 269 insert

"The Local Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offence, shall, if the Judge, on application made to him or his own motion, so directs be by jurors from a special jury list, and may revoke or alter such order

Ch. XXIII secs. 267-269

Trials before High Court to be by jury.

267. All trials under this chapter before a High Court shall be by jury; and, notwithstanding anything herein contained in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the twenty-fourth and twenty-fifth of Victoria, chapter 104, the trial may, if the High Court so directs, be by jury.

Act X of 1875, s. 32.

When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it must, except as provided in this section, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn. See s. 526, *post.*

Trials before Court of Session to be by jury or with assessors.

268. All trials before a Court of Session shall be either by jury or with the aid of assessors.

Act X of 1872, s. 232.

If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid; and if an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding.—*S. 536, post.*

Where, at the close of a trial, one of the assessors was discovered to be so deaf and blind as to be incapable of understanding the proceedings, the trial was held to be null and void.—*Mad. H. C. Pro.*, 22*nd July* 1869, *Weir*, p. 3.

Local Government may order trials before Court of Session to be by jury.

269. The Local Government may, [with the previous sanction of the G. G. in C.] by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may [with the like sanction] revoke or alter such order.

"When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury." [Act X of 1886, s. 9.]

Act X of 1872, s. 233, paras. 1 and 2.

The second paragraph of the original section has now been altered by Act X of 1886, s. 9. It was formerly as follows:

"When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for all such offences."

By a notification, dated 7th January 1862 (*Calcutta Gazette*, 1862, p. 87), it was ordered, that in the districts of the 24-Pergunnahs, Hooghly, Burdwan, Moorshedabad, Nuddea, Patna, and Dacca, the trial by any Court of Session of all the offences defined in Chaps. VIII, XI, XVI, and XVII of the Penal Code should be by jury.

Chapter VIII of the Penal Code relates to offences against the public tranquillity; Chap. XI to false evidence and offences against public justice; Chap. XVI, to offences affecting the human body and offences affecting life; and Chap. XVII, to offences against property.

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On the 27th May 1862, it was notified (*Calcutta Gazette*, 1862, p. 2041) that, in the abovementioned districts, the trial by any Court of Session of the offences defined in Chap. XVIII of the Penal Code (offences relating to documents and to trade or property marks) should be by jury. And on the 13th October 1862 (*Calcutta Gazette*, 1862, p. 3416), it was ordered, that abetments of, and attempts to commit, any of the abovementioned offences in the districts specified should be tried by jury.

By a notification, dated the 28th March 1862 (*Calcutta Gazette*, 1862, p. 1286), it was ordered that, in all the districts comprising the Assam Division, the trial of all offences by the Court of Session should be by jury.

The trial by the Court of Session at Poona of all offences for which, under Chaps. VIII, XI, XII, XVI, XVII or XVIII of the Indian Penal Code, or under any of those chapters taken in connection with s. 75 of the Indian Penal Code, the punishment awardable is death, transportation for life, or transportation or imprisonment for a period extending to ten years or upwards, and also of all abetments of, or attempts to commit, any of the offences included in those chapters, must be by jury in the Poona District. And any person who may be tried by a jury for any of the offences specified must be tried by the same jury for all offences with which he may be charged on the same trial.—*Bombay Gazette*, 1875, p. 798.

Trial of the undermentioned offences in the Sessions Courts of North Arcot, Cuddapa, Godavery, North Tanjore, South Tanjore, and in the Court of the Governor's Agent at Vizagapatam must be by jury:—The offences described in ss. 378, 380, 382, 392, 394, 395, 397, 398, 399, 400, 402, 411, 412, 414, 451, 452, 453, 454, 455, 456, 457, 458, 459, and 461 of the Penal Code. Madras Notifications, 15th March, 13th May, 25th July, and 1st August 1862; 14th April 1863, and 11th February 1870, *Weir*, p. 76.

The trial of all offences committed by European British subjects before the Courts of Session in Burma must be by jury.—*Burma Gazette*, 1877, *Part II*, p. 117.

The trial of all offences by the Court of the Recorder of Rangoon and by the Court of the Judge of the Town of Moulmein must be by jury (*Burma Gazette*, 1875, *Part II*, p. 233), which must consist of five persons.—*Burma Gazette*, 1876, *Part II*, p. 17.

Trial by jury ceases in a district when the district ceases to belong to a division to which trial by jury has been extended.—*Reg.* v. *Khoodeeram*, 8 W. R., Cr., 39.

If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid; if an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding.—*Post, s.* 536.

Where a jury, on a trial before a Court of Session, by a majority returned a verdict of 'not guilty' on all the charges, some of which were triable by assessors, it was held, that the Judge was bound to treat the trial as valid, and to proceed to record a final order in accordance with s. 263 of Act X of 1872 (s. 306 of this Code).—*In re Bhootnath Dey, Appellant*, 4 C. L. R., 405. So, in the case of *Emp.* v. *Lakshmana*, I. L. R., 9 Mad., 42, the Judge of the Sessions Court treated a jury who returned a verdict of guilty as assessors and acquitted the accused, but it was held that the irregular procedure of the Judge could not deprive the verdict of its legal effect.

Trial before Court of Session to be conducted by Public Prosecutor.

270. In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor.

Act X of 1872, s. 235.

For definition of "Public Prosecutor," see s. 4 (*m*), *ante*, p. 6.

The Public Prosecutor may avail himself of the services of Counsel retained by a private individual (*In re Narayan M. Pendshe*, 11 Bom. H. C. R., 102); and it is not necessary that the Counsel should be specially empowered by the Magistrate of the District for that purpose.—*In re Gungadhur Sircar*, 23 W. R., 14.

In the case of *Queen* v. *Ramchunder Sircar*, 13 W. R., Cr., 18, Kemp and Jackson, JJ., expressed an opinion that it was highly objectionable for prosecutions in Sessions Courts to be conducted by officers of the police. Under s. 495,

post, any person other than certain officers of police may be granted permission to conduct a prosecution. See s. 495 and the notes thereto.

The following rule is in force in Burma, when cases are committed by Magistrates other than the Magistrate of the District for trial by the Court of Session:—The committing Magistrate shall always notify the same to the Magistrate of the District, so that the latter may, under s. 235 of the Code of Criminal Procedure, empower some officer, where the services of the Government Advocate are not available, to conduct the prosecution before the Court of Session.—*Burma Gazette*, 1877, *Part III*, p. 133.

The authority of Government should be obtained by District Magistrates before employing for the prosecution professional agency other than that of the Government Pleader.—*Notification* (*Madras*), 11*th August* 1876, *Weir*, p. 82. The District Magistrate is not bound to employ the Government Pleader in conducting prosecutions.—1*st September* 1866, *ib.* Where a higher fee than that which a District Magistrate is authorized to disburse for a prosecution is considered necessary, application should be made to the Government.—*Ibid.*

See Chap. XXXVIII, *post.*

B.—Commencement of Proceedings.

Commencement of trial.

271. When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

Plea of guilty.

If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

Act X of 1872, s. 237; Act X of 1875, ss. 28-29, 73.

When arraigning an accused, and before receiving his plea, the Court should be careful to insure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge to which he is called upon to plead.—*Empress* v. *Vaimbilee*, I. L. R., 5 Calc., 826; *Aiyavu* v. *Empress*, I. L. R., 9 Mad., 61.

Under s. 494, any Public Prosecutor appointed by the Governor-General in Council or the Local Government may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person; and, upon such withdrawal, (*a*) if it is made before a charge has been framed, the accused shall be discharged; (*b*) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted.

A prisoner was charged under s. 211 of the Penal Code with having brought a false charge with intent to injure, by accusing A of having caused the death of a person by doing a rash or negligent act not amounting to culpable homicide under s. 304. He stated at the trial that the original complaint made by him was false, and that he made it unthinkingly. The Sessions Judge treated this statement as a plea of guilty, and sentenced the prisoner to rigorous imprisonment. No record of the prisoner's plea appeared on the proceedings, nor did it appear that the charge had been explained as well as read to the prisoner, and the Judge considered that the original complaint did not amount to a false charge of an offence under s. 304A. It was held, that the conviction was bad.—*In re Gopal Dhanuk*, I. L. R., 7 Calc., 96; (S. C.) 8 C. L. R., 471.

Where a prisoner, on the charge being read and explained to him, pleads guilty, the Judge must record the plea, and not merely record a narrative of what occurred and of the statements made by the prisoner.—*In re Gopal Dhanuk*, 8 C. L. R., 471; (S. C.) I. L. R., 7 Calc., 96. An admission which does not admit all the elements of the charge is not a plea of guilty to the charge.—*Ibid; Queen* v. *Sonaoollah*, 25 W. R., Cr., 23; *Nētai Luskar* v. *Empress*, I. L. R., 11 Calc., 410.

Ch. XXIII secs. 272-273

The prisoner should plead by his own mouth, and not through his Counsel or pleader.—*Reg.* v. *Roopa Gowalla*, 15 W. R., Cr., 42.

The language in which a plea is conveyed to the Court by the interpreter is the language in which it should be recorded.—*Empress* v. *Vaimbilee*, I. L. R., 5 Calc., 826.

If a prisoner pleads in effect not guilty, he must be tried, and the Sessions Judge is not justified in convicting him solely upon a confession made before the committing Magistrate.—*Queen* v. *Hursookh*, 2 All., 479.

If a prisoner pleads not guilty, and the Public Prosecutor does not offer evidence in support of the charge, the Judge ought to instruct the assessors that they are bound to find the prisoner not guilty.—*Proceedings*, *9th March* 1869, 4 Mad. H. C. Rul., xxxix.

A former trial set aside on the ground of want of jurisdiction and illegality is not a bar to a second trial.—*Reg.* v. *Muthoorapershad Panday*, 2 W. R., Cr., 10.

When a prisoner admitted before the Court of Sessions that he had killed his wife and no assessors were appointed, but the prisoner said that, at the time he committed the offence, he was out of his mind, whereupon the Judge took evidence on this point, and, coming to the conclusion that the prisoner's mind was not then affected, convicted him, it was held, that the prisoner's plea was in effect one of not guilty, and that the trial should not have proceeded without assessors.—*Queen* v. *Cheit Ram*, 5 All., 110.

See further notes to s. 255, *ante*, p. 243.

As to modification of procedure where there is a previous conviction, see s. 310, *post*.

Refusal to plead or claim to be tried.

272. If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case:

Trial by same jury or assessors of several offenders in succession.

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

The first paragraph of this section is taken from Act X of 1872, s. 238; see Act X of 1875, s. 30. The last paragraph is taken from Act X of 1872, s. 265; see also Act X of 1875, s. 34.

If a prisoner pleads in effect not guilty, he must be tried, and the Sessions Judge is not justified in convicting him solely upon a confession made before the committing Magistrate.—*Queen* v. *Hursookh*, 2 All., 479.

If a prisoner pleads not guilty, and the Public Prosecutor does not offer evidence in support of the charge, the Judge ought to instruct the assessors that they are bound to find the prisoner not guilty.—*Proceedings*, *9th March* 1869, 4 Mad. H. C. Rul., xxxix.

Any person summoned as an assessor to a Court of Session may apply for the payment of expenses incurred by him on account of attendance, and the Magistrate of the District shall, if the charges appear reasonable, order payment to be made; provided that the amount paid shall not exceed three rupees per diem.

In calculating the time occupied in attendance, if the journey be made otherwise than by rail, a distance of twelve miles shall be held to represent one day.—*Smyth*, p. 134.

There should ordinarily be a change of assessors after the trial of every third or fourth case.—*Mad. H. C. Pro.*, *11th February* 1863, *Weir*, p. 3.

Entry on unsustainable charge.

273. In trials before the High Court, when it appears to the High Court at any time before the commencement of the trial of the person charged

that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect. Ch. XXIII s. 274

Effect of entry. Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

Act X of 1875, s. 14. An entry made under this section is not an acquittal for the purposes of s. 403, *post.* Under s. 494, *post,* the Public Prosecutor also may, with the permission of the Court, withdraw from the prosecution of any person. Applications under this section should be disposed of by the High Court in the exercise of its Ordinary Original Criminal Jurisdiction.—*In re Charoo Chunder Mullick,* I. L. R., 9 Calc., 397.

C.—Choosing a Jury.

Number of jury. **274.** In trials before the High Court, the jury shall consist of nine persons.

In trials by jury before the Court of Session, the jury shall consist of such uneven number, not being less than three or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct.

The first paragraph of this section corresponds with s. 33 of Act X of 1875; the last, with s. 236 of Act X of 1872.

For rules as to choosing jurors in Calcutta, see Belchambers's *Rules and Orders,* pp. 256—267.

In trials by jury before a Court of Session, in which an European (not being an European British subject) or an American is the accused person, or one of the accused persons, it was notified that the jury should consist of five persons in the districts named in the subjoined list A, and of three persons in the districts named in list B:—

List A.

Burdwan.	Patna.
Midnapore.	Shahabad.
Hooghly.	Tirhoot.
Howrah.	Sarun and Chumparun.
24-Pergunnahs.	Monghyr.
Moorshedabad.	Bhaugulpore.
Dacca.	Cuttack.

List B.

Bancoorah.	Noakholly.
Beerbhoom.	Tipperah.
Nuddea.	Gya.
Jessore.	Purneah.
Dinagepore.	Sonthal Pergunnahs.
Maldah.	Pooree.
Rajshahye.	Balasore.
Rungpore.	Hazareebagh.
B[redacted]	Lohardugga.
Pubna.	Singbhoom.
Darjeeling.	Maunbhoom.
Julpigoree.	Goalparah.
Furreedpore.	Kamroop.
Backergunge.	Durrung.
Mymensingh.	Nowgong.
Sylhet.	Seebsaugur.
Cachar.	Luckimpore.
Chittagong.	

Calcutta Gazette, 1873, p. 152. See note to s. 276, *post.*

But by a subsequent notification it was ordered, that, in trials before the Court of Session in which the accused person is not an European or American, the jury should consist of five persons in all districts in which the system of trial by jury had been, or might thereafter be, extended.—*Calcutta Gazette*, 1873, p. 741.

In the N. W. Provinces, juries, in trials by jury before the Court of Session, must consist of seven persons.—*N. W. Provinces Gazette*, 1873, p. 1042.

The jury in trials before the Court of Session in the districts of Lahore, Delhi, Rawal Pindi, and Peshawur must consist of nine persons; in the districts of Amballa, Multan, and Sialkot, of five persons; and in all other districts of the Panjab, of three persons.—*Panjab Gazette*, 1873, p. 76.

For rules as to the payment of jurors and assessors in the Panjab, see *Panjab Gazette*, 1877, *Part III*, p. 188.

In all trials by jury before the Puna Court of Session, of offences under Chaps. VIII, IX, XII, XVI, XVII, XVIII of the Indian Penal Code, the jury must consist of five persons.—*Bombay Gazette*, 1873, p. 129. But in Bombay five has been fixed as the number for the jury in trials before the Courts of Session in the Bombay Presidency, in which an European, not being an European British subject or an American, is the accused person or one of the accused persons. —*Ibid.*

In the Madras Presidency, the jury shall consist of five jurors.—*Madras Notification*, 21*st December* 1872 *and* 4*th January* 1873, *Weir*, p. 76.

Jury for trial of persons not Europeans or Americans before Court of Session.

275. In a trial by jury, before the Court of Session, of a person not being an European or an American, a majority of the jury shall, if he so desires, consist of persons who are neither Europeans nor Americans.

Act X of 1872, s. 241.

As to the trial of European British subjects, see s. 451, *infra*.

A Judge is not bound to try a native Christian with the aid of a Christian jury. —*In re Bharut Chunder Christian*, 1 W. R., Cr., 2.

Jurors to be chosen by lot.

276. The jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from time to time by rule direct:

Proviso.

Provided that—

Existing practice maintained.

first, pending the issue under this section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed;

Persons not summoned when eligible.

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present; ~~and~~ (repealed by § 2 Act 13, 1896)

Trials before special jurors.

thirdly, in the Presidency-towns—

(*a*) if the accused person is charged with having committed an offence punishable with death, or

(*b*) if in any other case a Judge of the High Court so directs,

* added by Act XIII of 1896.

fourthly, in any district for which the Local Government has declared that the trial of certain offences may be by special jury, the jurors shall in any case in which the judge so directs, be chosen from the special jury list prescribed in section 325A."

the jurors shall be chosen from the special jury list hereinafter prescribed. Ch. XXIII s. 276

As to the first paragraph of this section, see Act X of 1872, s. 240, and Act X of 1875, s. 33.

As to proviso 1, see Act X of 1875, s. 49.

As to proviso 2, see Act X of 1872, s. 243, para. 3, and Act X of 1875, s. 33.

As to proviso 3, see Act X of 1875, s. 38.

This section contemplates that the names of the jury to be 'chosen by lot' shall all be drawn out of one box containing the names of all persons summoned to act as jurors.—*Reg.* v. *Vitaldas Pranjivandas*, I. L. R., 1 Bom., 462.

For practice in Bombay, see *Reg.* v. *Vithaldas Pranjivandas*, I. L. R., 1 Bom., 462; and in Calcutta, see *Belchambers's Rules and Orders*, pp. 256—267.

Irregularity in the selection of the jurors is not, unless the accused has been prejudiced, ground for setting aside a verdict. See *In re Jhubboo Mahton*, I. L. R., 8 Calc., 739, and s. 537, *post*.

As to the meaning of "High Court" in this section, see s. 266, *ante*, as amended by Act X of 1886, s. 8.

Rules for the selection of Jurors by lot from the persons summoned to act as such.

The following rules, made under the authority conferred by s. 276, Act X of 1882 (Code of Criminal Procedure), are laid down for the guidance of the Subordinate Criminal Courts:—

Courts of Session.

I.—In order to nominate a jury for the trial of any prisoner or other person to be tried by jury, the Sessions Judge shall cause to be put together in one box cards or pieces of paper containing the names of all the persons summoned to attend, except such of the said persons as shall have been excused by the Sessions Judge from serving on that day in consequence of their having served as jurors on the previous day, or for any other cause. Such cards or pieces of paper shall be, as nearly as may be, of equal size, and each shall bear the name of one person summoned to attend. The Sessions Judge shall then, in open Court, draw, or cause to be drawn, out of the said box, one after another, as many of the said cards or pieces of paper as may represent the number of jurors required to try the case,[1] and if any of the jurors whose names shall be so drawn

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[1] The number of jurors has been fixed as follows (section 274, Cr. P. C.) :—

(1) When accused is a European (not a European British subject) or an American, the jury shall consist :—

(*a*) of five persons in the following districts, *viz.* :—

Burdwan.	Moorshedabad.	Sarun and Chumparun.
Midnapore.	Dacca.	Monghyr.
Hooghly.	Patna.	Bhaugulpore.
Howrah.	Shahabad.	Cuttack.
24-Pergunnahs.	Tirhoot.	

(*b*) of three persons in the following districts, *viz.* :—

Bankura.	Furridpore.	Balasore.
Birbhoom.	Backergunge.	Hazaribagh.
Nadiya.	Mymensingh.	Lohardugga.
Jessore.	Sylhet.	Singbhoom.
Dinagepore.	Cachar.	Manbhoom.
Maldah.	Chittagong.	Goalparah.
Rajshahye.	Noakhally.	Kamroop.
Rungpore.	Tipperah.	Darrang.
Bogra.	Gya.	Nowgong.
Pubna.	Purneah.	Sibsagar.
Darjeeling.	Sonthal Pergunnahs.	Luckimpore.
Julpigori.	Pooree.	

(*Notification, Government of Bengal*, 4*th January* 1873, "*Calcutta Gazette*," 22*nd ib.*, *Part I*, page 152.)

(2) When accused is not a European or American, the jury shall consist of five persons in all the districts to which the system of trial by jury has been, or may hereafter be, extended.

(*Notification, Government of Bengal*, 4*th June* 1873, "*Calcutta Gazette*," 11*th ib.*, *Part I*, page 741.)

Ch. XXIII s. 276 shall not appear, or if any be objected to, and the objection be allowed, then such further number shall be drawn as may be necessary to complete the number of jurors required for the case.

II.—In cases in which not less than one-half of the jury must be either Europeans or Americans (s. 460, C. C. P., and s. 451, C. C. P. read with s. 7, Act III of 1884), or both Europeans and Americans (s. 451, C. C. P. read with s. 7, Act III, 1884), the jurors shall be chosen as follows:—

First.—Not less than one-half of such jury shall be chosen by lot, in the manner prescribed by Rule I, from a box containing the names of only Europeans or Americans, or Europeans and Americans, until the necessary majority is complete.

Second.—To the names of jurors not so chosen shall then be added the names of all the other jurors summoned to attend, and the number necessary to complete the jury shall then be chosen by lot in the manner prescribed by Rule I.

III.—In cases in which not less than one-half of the jury must be neither Europeans nor Americans (s. 275, C. C. P.), the jurors shall be chosen as follows:—

First.—Not less than one-half of such jury shall be chosen by lot, in the manner prescribed by Rule I, from a box containing the names only of such persons as are neither Europeans nor Americans, until the necessary majority is complete.

Second.—To the names of jurors not so chosen shall then be added the names of all the other jurors summoned to attend, and the number necessary to complete the jury shall be chosen by lot in the manner prescribed by Rule I.

IV.—When the jurors have been finally selected, their names shall be entered on the fly-leaf prescribed for records of Sessions trials (page 220, Cr. R. and O.), the "foreman" (s. 280, C. C. P.) being specially designated as such.

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(3) When accused is a European British subject, the jury shall consist:—

(c) of five persons in the districts named in the subjoined list A, and of three persons in the districts named in list B:—

List A.

Bhagulpore.	Hooghly.	Mozufferpore.
Burdwan.	Howrah.	Nadiya.
Chittagong.	Jessore.	Patna.
Chumparun.	Lohardugga.	Purneah.
Dacca.	Midnapore.	Sarun.
Durbhunga.	Monghyr.	24-Pergunnahs.
Hazaribagh.	Moorshedabad.	

List B.

Backergunge.	Furreedpore.	Pooree.
Balasore.	Gya.	Pubna.
Bankura.	Julpigori.	Rajshahye.
Beerbhoom.	Khoolna.	Rungpore.
Bogra.	Maldah.	Shahabad.
Cuttack.	Manbhoom.	Singbhoom.
Darjeeling.	Mymensingh.	Sonthal Pergunnahs.
Dinagepore.	Noakhally.	Tipperah.

(*Notification, Government of Bengal,* 17*th June* 1885.)

And of five persons in the following districts in Assam, in trials before the Court of Session, as well as in trials before a District Magistrate under the provisions of Act III of 1884:—

Goalpara.	Nowgong.
Darrang.	Lakhimpur (excluding the Dibrugarh frontier tract).
Sibsagar.	Cachar (excluding the North Cachar frontier tract).
Sylhet.	
Kamrup.	

(*Notification, Chief Commissioner, Assam, No.* 53 *of* 2*nd July* 1885.)

District Magistrates' Courts. Ch. XXIII secs. 277-279

V.—The above rules, *mutatis mutandis*, shall apply to the selection of jurors in cases before District Magistrates, in which the accused is a European British subject, and claims to be tried by a mixed jury [s. 451 (*a*), C. Cr. P.] Such jurors shall be selected from the persons summoned, under the provisions of s. 462 of the Code, to attend for the purposes of the trial.—*Rule No.* 4 *of* 25*th June* 1886, *Wilkins*, Addenda, p. 90.

Names of jurors to be called.

277. As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

Objection to jurors.

Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated:

Objection without grounds stated.

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

As to the first paragraph, see Act X of 1872, s. 243, paras. 1 and 2, and Act X of 1875, s. 53; and as to the last, see Act X of 1875, s. 47, para. 1.

Grounds of objection.

* **278.** Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed—

(*a*) some presumed or actual partiality in the juror;

(*b*) some personal ground, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years;

(*c*) his having by habit or religious vows relinquished all care of worldly affairs;

(*d*) his holding any office in or under the Court;

(*e*) his executing any duties of police or being entrusted with police-duties;

(*f*) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury;

(*g*) his inability to understand the language in which the evidence is given, or, when such evidence is interpreted, the language in which it is interpreted;

8. (*h*) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

Act X of 1872, ss. 244, 405, 406; Act X of 1875, ss. 47, 54. Clause (*g*) corresponds with the provisions of Act X of 1872, s. 245, and Act X of 1875, s. 57.

Decision of objection.

279. Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

Ch. XXIII secs. 280-282

If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276; or, if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury, provided that no objection to such juror or other person is taken under section 278 and allowed.

Supply of place of juror against whom objection allowed.

As to para. 1, compare Act X of 1872, s. 243, para. 3, and Act X of 1875, ss. 48, 55; and as to para. 2, compare Act X of 1872, s. 243, para. 4, and Act X of 1875, s. 56.

280. When the jurors have been chosen, they shall appoint one of their number to be foreman.

Foreman of jury.

The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

Act X of 1872, s. 246; Act X of 1875, s. 58.

281. When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873.

Swearing of jurors.

This is new, altering the law as laid down by *Reg.* v. *Lakshuman Ramchandra*, 3 Bom. H. C., Cr., 56, where it was held, that it was not necessary, in a trial before a Court of Session, that the jurors should be sworn.

282. If, in the course of a trial by jury, at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself, and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given, or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

Procedure when juror ceases to attend, &c.

In each of such cases the trial shall commence anew.

Act X of 1872, s. 254. The provision as to a juror unable to understand the evidence is new. Under s. 332, *post*, a juror or assessor is liable to a fine of Rs. 100 for non-attendance.

Where, at the close of a trial, one of the assessors was discovered to be so deaf and blind as to be incapable of understanding the proceedings, the trial was held to be null and void.—*Mad. H. C. Pro.*, *22nd July* 1869, *Weir*, p. 3.

Discharge of jury in case of sickness of prisoner.

283. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

Act X of 1875, s. 99.

D.—Choosing Assessors.

Assessors how chosen.

284. When a trial is to be held with the aid of assessors, two or more shall be chosen, as the Judge thinks fit, from the persons summoned to act as such.

Act X of 1872, s. 239.

The same assessors may aid in the trial of as many accused persons successively as the Court thinks fit. See note to s. 72, *supra*.

Procedure when assessor is unable to attend.

285. If, in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of fresh assessors.

Act X of 1872, s. 259. An assessor is liable to a fine of Rs. 100 for non-attendance—s. 332, *post*.

E.—Trial to Close of cases for Prosecution and Defence.

Opening case for prosecution.

286. When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

Examination of witnesses.

The prosecutor shall then examine his witnesses.

Compare Act X of 1872, s. 247, as amended by Act XI of 1874, s. 19, and Act X of 1875, s. 59.

As to modification of procedure in case of previous convictions, see. s. 310, *post*.

The witnesses must be examined. It is not sufficient, even with the consent of the pleader for the defence, to put in the depositions taken before the Magistrate, and allow the witnesses to be cross-examined upon them.—*Subba* v. *Emp.*, I. L. R., 9 Mad., 83.

Duty of Prosecution.—It is the duty of the Public Prosecutor, at a trial before the Court of Session, to call and examine all material witnesses sent up

Ch. XXIII s. 287 to the Court on behalf of the prosecution, and the Judge is bound to hear all the evidence upon the charge. But the Public Prosecutor, it was held by TYRRELL, J., is not bound to call any witnesses who would not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is the reason for not calling these witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion. In the absence of any such explanation or other reasonable grounds apparent in the face of the proceedings, inferences unfavourable to the prosecution must be drawn from the non-production of its witnesses.—*Emp.* v. *Tulla*, I. L. R., 7 All., 904.

In Sessions cases, every vernacular (1) document, (2) deposition, or (3) examination of an accused person, admitted in evidence at the trial, shall be translated into English, and a copy of such translation fairly written out shall be incorporated in the record. Provided that, when a vernacular document, the contents of which are not relevant, is used in evidence for a limited purpose, such as to prove a signature, or handwriting, or the nature of writing materials, or the like, it shall not be necessary to make an English translation of the contents of such document. The translation of more than one document, deposition, or examination shall not be written on one sheet of paper.—*C. O. No.* 4 *of* 28*th February* 1884, *Wilkins, Addenda*, pp. 64 and 68.

Examination of accused before Magistrate to be evidence.

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

Act X of 1872, s. 248; Act X of 1875, s. 60.

Section 80 of the Evidence Act (I of 1872) provides that "whenever any document is produced before any Court purporting to be a record or memorandum of the evidence, or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and that such evidence, statement, or confession was duly taken." See memorandum required under s. 164, *ante*.

A deposition given by a person is not admissible as evidence against him in a subsequent proceeding without its being first proved that he was the person who was examined and gave the deposition. — *Empress* v. *Durga Sonar*, I. L. R., 11 Calc., 580. There a pardon had been tendered to an accused, and his evidence was recorded by the Magistrate. Subsequently the pardon was revoked, and he was put on trial before the Sessions Judge with the other accused. His former deposition was put in and used without any proof that he was the person who was examined before the Magistrate. The deposition was held to be inadmissible. See *Reg.* v. *Nussuruddin*, 21 W. R., Cr., 5.

As to examining the prisoner during the course of a trial, see s. 342, *infra*, and notes to ss. 209 and 253, *ante*.

This section only refers to the examination of an accused by or before the committing Magistrate, but a confession taken under s. 164, *ante*, is also admissible. See s. 533, *post*.

Section 30 of the Evidence Act provides that "when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Illustrations.

"(*a*.) A and B are jointly tried for the murder of C. It is proved that A said, 'B and I murdered C.' The Court may consider the effect of this confession as against B.

"(b.) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, 'A and I murdered C.' This statement may not be taken into consideration by the Court as against A, as B is not being jointly tried." Ch. XXIII s. 287

Although the confession of a prisoner affecting himself and another person charged with the same offence is, when duly proved, admissible as evidence against both, such person cannot, when it is uncorroborated as against him, be legally convicted on it.—*Empress* v. *Ashootosh Chuckerbutty*, I. L. R., 4 Calc. (F. B.), 483; (S. C.) 3 C. L. R., 270; *Proceedings*, 16*th October* 1876, I. L. R., 1 Mad., 163; *Venkatasami* v. *Reg.*, I. L. R., 7 Mad., 102.

A deposition given by a person to whom a conditional pardon has been tendered is not, after withdrawal of the pardon, admissible against him on a subsequent proceeding or on the trial of himself with his accomplices, unless it is first proved that he was the person who was examined and gave the deposition (*Empress* v. *Durga Sonar*, I. L. R., 11 Calc., 580); and apparently a confession made by an accused before a Court other than the Court trying him could not be used against him or against persons tried jointly with him without evidence being given, identifying him as the person who made the confession. See the note to s. 164, *supra*, as to the use of confessions on joint trials, p. 143. A confession of one of several accused persons made in the absence of the others is of no weight as against the latter. Such confessions, like statements of approvers, are always regarded as tainted.—*Empress* v. *Bepin Biswas*, I. L. R., 10 Calc., 970.

A Judge should charge a jury that mere confessions of prisoners tried simultaneously for the same offence are only to be rated as evidence of a very defective character as against others than those who made them, and that they require especially careful scrutiny before they can be safely relied on.—*Reg.* v. *Sadhu Mundul*, 21 W. R., Cr., 69.

Where two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice, and capable therefore of constituting a separate offence from that of the accomplice.—*Empress* v. *Nur Mahomed*, I. L. R., 8 Bom., 223. See *Reg.* v. *Purbhudas Ambaram*, 11 Bom. H. C. R., 90.

An admission by certain persons that the crime charged against them was committed by certain other persons, and that whatever share they had in it was under compulsion, is not a confession upon which any person ought to be convicted.—*Queen* v. *Kisto Mundul*, 7 W. R., Cr., 8.

It is not necessary for a Sessions Judge to read out to prisoners confessions made by them before a Magistrate, and ask them whether they have any objection to the reception of these confessions. The examination of prisoners before a Magistrate is to be received in evidence, and the attestation of the Magistrate is *primâ facie* proof of the circumstances.—*Queen* v. *Misser Sheikh*, 14 W. R., Cr., 9. See further note to s. 298, *post*.

Before criminating a man on his own statement under examination, the Court should be satisfied that such statement was deliberately made and recorded; that, after being recorded, it was shown or read to the accused, so that he might be assured that his words were correctly taken down, and these important circumstances should be attested by the signature of the Magistrate following the certificate mentioned in s. 346 (s. 364 of the present Code), which is to be given under his own hand.—*Queen* v. *Mussamut Niruni*, 7 W. R., Cr., 49.

And where a statement made by a prisoner before a Magistrate, though signed by the Magistrate, does not contain such certificate, it does not of itself constitute *primâ facie* evidence of the examination within the meaning of this section, and if other proof is not given (now under s. 533, *post*) to show that the statement was made by the prisoner before the Magistrate, the statement is not admissible as evidence at the Sessions.—*Queen* v. *Petumber Dhoobee*, 14 W. R., Cr., 10.

A prisoner may be convicted on his own uncorroborated confession (*Queen* v. *Runjeet Sontal*, 6 W. R., Cr., 73), even in a case of murder.—*Queen* v. *Hyder Jalaha*, *ib.*, 83.

A confession before the Magistrate, though afterwards retracted before the Sessions Court, is evidence against the party making it (*Queen* v. *Mussamut Jema*,

Ch. XXIII s. 288 8 W. R., Cr., 40); provided the Judge be satisfied that it was made voluntarily.—*Queen* v. *Sreemutty Mongola*, 6 W. R., Cr., 81.

At the Sessions trial the prisoner retracted his statement when it was read over to him, and said that he was compelled to make it. The Judge without making any inquiry or taking any evidence on the point submitted the prisoner's statement to the jury as a confession. It was held, that the Judge was wrong in so doing, and that he should rather have charged the jury not to accept the prisoner's statement as a confession.—*Queen* v. *Gunesh Koormee*, 4 W. R., Cr., 1.

A Sessions Judge should compare the statements of the witnesses recorded by the Magistrate at the preliminary investigation with the evidence of the same witnesses at the Sessions [*Queen* v. *Bindabun Bowree*, 5 W. R., Cr., 54, *per* NORMAN and L. S. JACKSON, JJ. (CAMPBELL, J., dissenting)]; and, it was held by WILSON, J., he may direct the attention of the jury to discrepancies between the evidence given by witnesses in the Sessions Court and that given before the Magistrate without the depositions being put in.—*Empress* v. *Haran Chunder Mitter*, 6 C. L. R., 390.

The examination of the accused before the Magistrate must be given in evidence at the Sessions trial, whether it tells for or against the prisoner, and it is not in the discretion of the prosecution to put in that examination or not.—*Queen* v. *Sheikh Mehar Chand*, 13 W. R., Cr., 63; *Queen* v. *Misser Sheikh*, 14 W. R., Cr., 9.

Examinations of accused persons, depositions, &c., how received in evidence at a Sessions trial.—(*a.*) The 'examination of the accused person,' which is directed by s. 287 of the Code of Criminal Procedure, shall be tendered by the prosecution and read as evidence *before the accused is called upon to enter on his defence.*

(*b.*) So also should be the deposition of a medical witness which "may be given in evidence" (s. 509), and the examination of a witness in a case in which it 'may be given in evidence' under s. 33 of the Evidence Act (if it is considered desirable on the part of the prosecution to put in such examination).

(*c.*) Before examinations are received as evidence under any of these three sections, care must be taken to see that they are in proper form and duly attested, or otherwise strictly proved. And under s. 33 of the Evidence Act, I of 1872, the examination cannot be given as evidence unless it is proved that the witness, whose examination it is proposed to put in, is dead, or the Court is satisfied that for sufficient cause his attendance cannot be procured.

(*d.*) Such examinations, when so received, are to be detached from the proceedings in the preliminary inquiry and *annexed* to the record of the trial.—*Calc. H. C. C. O., No.* 11 *of 2nd September* 1867, *Wilkins*, p. 114.

(*e.*) *Confessions to be translated.*—When confessions or examinations of accused persons made before a Magistrate form part of the evidence against the persons committed for trial to the Court of Session, they should be accompanied by translations into English fairly written out.—*Calc. H. C. C. O., No.* 4 *of* 10*th August* 1872, *Wilkins*, p. 114.

In a trial before a Court of Session, the examination of the accused person which this section requires to be given in evidence should be read as part of the case for the prosecution before the defence is entered upon and marked as an exhibit. A note to the effect that this has been done should be entered in the record. See *Mad. H. C. Pro.*, 31*st March and* 11*th November* 1869, *Weir*, p. 44.

Evidence given at preliminary inquiry admissible.

288. The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case.

Act X of 1872, s. 249, as amended by Act XI of 1874, s. 20; Act X of 1875, s. 75.

The witness must be *produced and examined* before the Judge in order that his depositions may be treated as evidence under this section.

If it be proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for

trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence, or his attendance cannot be procured without an amount of delay, expense, or inconvenience which, under the circumstances of the case, would be unreasonable.—*S.* 512, *post.* See note to that section. See *In re Dham Mundul*, 6 C. L. R., 53. Ch. XXIII s. 288

Section 33 of the Evidence Act, I of 1872, provides that "evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

"Provided that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; and that the questions in issue were substantially the same in the first as in the second proceeding.

"*Explanation.*—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and accused within the meaning of this section."

In *Reg.* v. *Arjun Megha*, 11 Bom. H. C. R., 282, West, J., said: "We think that the purpose of s. 249 of the Criminal Procedure Code (Act X 1872), as recently amended, is to make depositions given before Magistrates in the preliminary inquiry, evidence for the purposes of the trial in the Court of Sessions, only when the Sessions Judge determines, in the exercise of his discretion, that they are to be used in this way. But we think that the exercise of this discretion, considering it as a matter of fact or of law, is open to review by this Court in appeal. When a case is under trial in a Court of Session, the Sessions Judge has the depositions given in the Magistrate's Court before him. If he finds that the statements of the witnesses in his own Court differ materially from those previously made by the same witnesses, it is his duty to examine them as to the discrepancies, and this is more specially his duty when the prisoners are undefended, and contradictory testimony is given for the prosecution. But if he thus examines the witnesses, he ought (see Taylor on Evidence, ss. 1300, 1301, and Indian Evidence Act, s. 155), in ordinary cases, to make the depositions upon which he has examined them evidence in the case; he is at liberty to do so, and the power should be exercised so as to bring all relevant matter, so far as possible, under consideration in forming a judgment on the case. If the Sessions Judge has omitted to examine witnesses on obvious and important discrepancies in their statements, this Court will, in general, direct that such an examination be made, and the Sessions Judge, having the witnesses before him for such a purpose, will, in most cases, feel it his duty to make the former depositions evidence *quantum valeant* for the purposes of the final adjudication in appeal. The alternative is for this Court in such cases to order a new trial, on the ground that there has been a misuse of the Sessions Judge's discretion which may have caused a defeat of justice; but a new trial will not be ordered except in special cases."

Under s. 33 of the Evidence Act, depositions of an absent witness are only admissible when the prisoner has had the right and opportunity to cross-examine.—*Reg.* v. *Etwaree Dharu*, 21 W. R., Cr., 12. Inconvenience to witnesses is no ground allowed under s. 33 of the Evidence Act.—*Emp.* v. *Burke*, I. L. R., 6 All., 224. See *Reg.* v. *Lukhun Santhal*, 21 W. R., Cr., 56. The former deposition must have been before a person authorized by law to take it. If it was taken in a proceeding pronounced to be *coram non judice*, it cannot be used.—*Rama Reddy*, I. L. R., 3 Mad., 48.

In the case of *Joyudee Paramanick*, 7 C. L. R., 66, Field, J., expressed a grave doubt, whether the deposition of an approver taken before the committing Magistrate might be used as evidence against his accomplices on their trial before the Sessions Court, the conditional pardon of the approver having been withdrawn. A similar doubt was expressed by the Court (Prinsep and Tottenham, JJ.) in the case of *Nanha Malla* v. *Empress*, 13 C. L. R., 326.

Ch. XXIII s. 288 This section, it has been recently held, was never intended to be used so as to enable a Court trying a case to take a witness's deposition bodily from the committing Magistrate's record and to treat it as evidence before the Court itself.—*Emp.* v. *Dam Sahai*, I. L. R., 7 All., 862. It contemplates the evidence recorded by the committing Magistrate as not being ordinarily evidence in this case. It is only in case of individual witnesses, "if such witnesses are produced and examined," that the Judge may, in his discretion, treat their evidence as evidence in the case.—*Subba* v. *Emp.*, I. L. R., 9 Mad., 89. See *Shib Dyal* v. *Emp.*, Panj. Rec., 1883, p. 54; *Reg.* v. *Majohur Roy*, 24 W. R., Cr., 11. In the case of *Shib Dyal* v. *Emp.*, Panj. Rec., 1883, p. 54, the evidence of a witness in an inquiry upon a charge of murder was taken in presence of the accused by the Magistrate, who, being of opinion that the witness was concerned in the murder, committed her for trial to the Sessions Court with the original accused. In the Sessions Court the deposition was used, but it was held to have been wrongly used, as she was not under this section of the Code produced and examined as a witness.

Where a Judge proposes to contradict witnesses by their statements made before the committing Magistrate, he is bound to put to them the whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statement.—*Emp.* v. *Dam Sahai*, I. L. R., 7 All., 862.

The statement of a prisoner, whether taken as a confession or an examination, may be received as evidence.—*Reg.* v. *Suneechur*, 5 W. R., Cr., 1. As to the formalities required, see *Reg.* v. *Nussuruddin*, 21 W. R., Cr., 5, and Evidence Act, s. 80, and s. 164, *ante*, p. 141. The certificate of a Magistrate appended to a confession, in order to afford *primâ facie* evidence, under s. 80 of the Evidence Act, of the circumstances mentioned in it relative to the taking of the statement, ought to give the facts necessary to render the deposition admissible under the section.—*Reg.* v. *Nussuruddin*, 21 W. R., Cr., 5. If the examination of an accused person taken before the Magistrate is afterwards read in evidence at the trial before the Sessions Court, the whole of it should be read out.—*Proceedings, 5th November* 1869, 5 Mad. H. C. R., iv. But the deposition of a person is not admissible against him in a subsequent proceeding without proof that he made the deposition.—*Emp.* v. *Durga Sonar*, I. L. R., 11 Calc., 580.

Where the Sessions Judge considered that the evidence given before him was untrustworthy, but nevertheless convicted the accused under this section upon the evidence given by the same witnesses before the committing officer, it was held, that the conviction was bad.—*Queen* v. *Amanullah*, 21 W. R., Cr., 49; (S. C.) 12 B. L. R., Appx., 15. PHEAR, J., said: "The Judge founds his conviction of the prisoner upon the testimony which was given before another judicial officer, not before himself, by the very persons who, according to his own view, before him showed themselves in the very same matter to be utterly unworthy of belief. Even if s. 249 (s. 288 of this Code) warranted the Court in taking such a step as this, it seems to me certainly an inordinately long step to take. And I might almost say that the logical consequence would be, that the taking of evidence in the Sessions Court might be altogether dispensed with; for, if it is legitimate, proper, and safe that the Sessions Court should come to a verdict against the prisoner upon the evidence given before the Magistrate by witnesses who before the Sessions Court denied that evidence and showed themselves unworthy of belief, *à fortiori* it would be right, proper, and safe for the Sessions Court to found its judgment upon the evidence given before the Magistrate in those cases where the witnesses afterwards confirm that evidence by the testimony which they give in the Sessions Court. And I think that this very obvious consequence shows very conclusively that the Judge misapprehended the true scope of s. 249 (s. 288 of this Code) of the Criminal Procedure Code." . . . . "It appears to me that the Legislature, in framing this enactment, desired merely to authorize the Court to take a particular statement made by a witness before the committing Magistrate as the true statement, notwithstanding that it was denied, or a statement inconsistent therewith was made, by the witness before the Court itself, if the Court could see from the evidence of that same witness before itself, or of other witnesses before itself, that the original statement was worthy of belief, not that the Court should discard wholly the testimony of witnesses given before it, and have recourse to the testimony of the same persons which was given elsewhere before another

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judicial officer on the occasion of making the investigation preliminary to the final trial. The discretion which is conferred by the passage 'if the Court thinks fit' in s. 249 is to be exercised upon substantial materials rightly before the Court, and reasonably sufficient to guide the judgment of the Court as to the truth of the matter, and not as was the case here, upon mere speculation or conjecture." And MORRIS, J., said: "It seems to me that under s. 249 [288] of the Criminal Procedure Code, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, where there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is to a certain extent corroborated by independent testimony before himself. In the present instance there is nothing of this kind. There is really no one such substantive fact conclusively proved as can enable the Judge to say with confidence that the evidence given before the Magistrate was true as opposed to what was said before himself. Nor can it be said that the Police-officer, or any other witness before the Court of Session, affords independent testimony corroborative of the evidence given before the Magistrate." In the case of *Emp.* v. *Dam Sahai*, I. L. R, 7 All., 862, STRAIGHT, J., expressed his approval of these remarks of PHEAR, J.

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Upon an inquiry before a Magistrate in a case of murder, two vakeels presented their vakalutnamahs and applied to be allowed to conduct the defence of the accused. The Magistrate refused permission, and, after recording the depositions of the witnesses, committed the accused to take their trial before the Sessions Court. In the Court of the Magistrate the only material evidence for the prosecution was that of three witnesses, who, on being examined in the Sessions Court, denied all knowledge of the facts to which they had deposed before the Magistrate. Two of them denied having made the statements recorded, while the third admitted the statements attributed to him, but asserted that they were false and made under pressure. The Sessions Judge, disbelieving the statements made in his Court, thereupon used the previous depositions as evidence in the case, and mainly upon these convicted the accused of murder and sentenced them to transportation for life. Against this conviction and sentence the prisoners appealed to the High Court, on the ground that the previous depositions ought not to have been used as evidence in the case, as the Magistrate had refused to allow their pleaders to appear and cross-examine the witnesses who made the depositions. The High Court affirmed the sentence.—*In re Dham Mundul*, 6 C. L. R., 53.

289. When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

Procedure after examination of witnesses for prosecution.

If he says that he does not, the prosecutor may sum up his case; and if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict, of not guilty.

If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict, of not guilty.

If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that

Ch. XXIII s. 289 there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

Act X of 1872, s. 251, paras. 1 and 2; Act X of 1875, s. 62. The paragraph authorizing the Court to record a finding, or direct a jury to return a verdict, of 'not guilty' in a case where the accused says he means to adduce evidence in his defence, but the Court is of opinion that there is no evidence that the accused committed the offence, is new.

The words "the prosecutor may sum up his case" do not exclude the assistance of counsel.—*In re Narayen M. Pendshe*, 11 Bom. H. C. R., 102.

Where, on being asked under this section, the accused has stated that he means to adduce evidence, but on further consideration does not do so, the Court is not at liberty to make a presumption adverse to the accused from the circumstance that he has not adduced evidence.—*Hurry Churn Chuckerbutty* v. *Empress*, 13 C. L. R., 358; (S. C.) I. L. R., 10 Calc., 140. In that case, at the close of the evidence for the prosecution, the attorney for the defence, in answer to the Judge, stated that he meant to call witnesses. The Court then adjourned; and, on the following day, the attorney stated that, on reconsideration, he did not intend to call witnesses. The Judge allowed the prosecution to reply. On appeal the High Court (PRINSEP and TOTTENHAM, JJ.) held that, although the strict interpretation of ss. 289 and 292 of the Code would warrant this course, it was never meant by the Legislature that the prosecutor should have a reply when no witnesses are called for the defence, the object of the law being evidently to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecution in such a case as that before them.

So it was held that the fact that the accused had, during the cross-examination of the witnesses for the prosecution, used certain documents, and that such documents had been put in evidence on his behalf did not entitle the prosecutor to the right of reply, if, when asked upon the close of the case for the prosecution, whether he meant to adduce evidence, the accused said that he did not.—*Empress* v. *Grees Chunder Banerjee*, I. L. R., 10 Calc., 1024. See s. 292, *post*.

An accused should be called upon to enter upon his defence and to produce his evidence when the case for the prosecution has been brought to a close. Where, therefore, one witness for the prosecution was recalled after the prisoner had made his defence, and the prisoner had no opportunity of calling evidence with reference to the evidence of that witness, the High Court quashed the conviction and ordered a new trial.—*Queen* v. *Assanoollah*, 13 W. R., Cr., 15. See notes to s. 256, *ante*, p. 244.

If, on being called on to enter upon his defence and to produce his evidence, the accused makes any statement in defence, it ought to be recorded; if he does not voluntarily make any statement, and declines to answer any question put by the Court, the fact should be noted, and when there is nothing else to show the nature of the defence, a note of the address to the Court, if any, should be recorded. The record is not complete unless it shows the nature of the defence set up.—*In re Gopal Hajjam*, 15 W. R., Cr., 16.

Witnesses for the defence ought not to be examined until after the evidence for the prosecution has been taken, for it is only when sufficient evidence has been produced against him that an accused can be called upon to go into his defence.—*In re Turibullah*, 4 C. L. R., 338.

In conducting a case for the prosecution, all persons who are alleged or known to have any knowledge of the facts ought to be brought before the Court and examined. It is not a valid ground for the non-production of witnesses in the Sessions Court that they had been examined by the committing Magistrate against the express wish of the Police-officer in charge of the prosecution.—*Empress* v. *Ram Sahai Lal*, I. L. R, 10 Calc., 1070.

If an accused person has not his witnesses present, the Judge should, if he sees grounds for proceeding, first call upon him for his defence and then postpone the

case.—*Queen* v. *Jamiruddin*, 23 W. R., Cr., 58. See also *Queen* v. *Ishan Dutt*, 6 B. L. R., Appx., 88; (S. C.) 15 W. R., 34.

When there is nothing in the evidence which, if believed, amounts to proof, the case should not be left to the jury (*Queen* v. *Greedharee Manje*, 7 W. R., Cr., 39), as a verdict of guilty cannot, under the circumstances, be sustained (*Queen* v. *Rutton Dass*, 16 W. R., Cr., 19); but if there is some evidence, the case must go to the jury, even though the Judge disbelieves the evidence.—*Re Huroo Shaha*, 16 W. R., Cr., 20.

It would seem from *Reg.* v. *Parvati*, 7 Bom. H. C. R., C. C., 82, which was decided under Act XXV of 1861, s. 372, that when a judgment of acquittal is recorded, it is not necessary to ask the assessors their opinion. See also *In re Narain Das*, I. L. R., 1 All., 610*n*.

Cross-Examination.—It will be observed that while s. 290 expressly provides for the cross-examination of the witnesses for the defence, this section is silent as to the cross-examination of the witnesses for the prosecution by the accused. An accused person, however, is always entitled to cross-examine the witnesses for the prosecution. See notes to s. 256, *ante*, and s. 128 of the Evidence Act, I of 1872. The Court cannot refuse even to allow the cross-examination of a witness called by itself.—*In re Greesh Chunder Talukdar*, 5 C. L. R., 364; (S. C.) I. L. R., 5 Calc., 614. A Judge ought to allow the accused an opportunity of cross-examining all witnesses whose depositions have been taken for the prosecution before the committing Magistrate, but whose evidence is dispensed with at the trial. His refusal to do so is not an error in law, though matter for comment by the Counsel for the accused.—*Reg.* v. *Fattechand Vastachand*, 5 Bom. H. C. R., Cr., 85; *Empress* v. *Greesh Chunder Talukdar*, 5 C. L. R., 364; (S. C.) I. L. R., 5 Calc., 614.

Duties of Prosecution.—The relative duties of the prosecution and the defence were described in the following remarks made in the case of *Dhunnoo Kazi*, 10 C. L. R., 151; (S. C.) I. L. R., 8 Calc., 121.

"The only legitimate object of a prosecutor is to secure not a conviction, but that justice may be done. The prosecutor, therefore, is not free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his power directly bearing on the charge. It is *primâ facie* his duty accordingly to call those witnesses who, from their connection with the transaction in question, must be able to give important information. The only thing that can relieve the prosecution from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution.

There is no corresponding obligation upon the accused. He is merely on the defensive, and owes no duty to anyone but himself. He is at liberty, as to the whole, or any part of the case against him, to rely on the weakness of the case for the prosecution or to call witnesses, or to meet the charge in any other way he chooses. And no inference unfavourable to him can properly be drawn, because he takes one course rather than another."—*Per* WILSON, J. The case of *Dhunnoo Kazi* was referred to and approved in *Hurry Churn Chuckerbuty* v. *Empress*, 13 C. L. R., 358; (S. C.) 10 Calc., 140. See *Empress* v. *Ram Sahai Lal*, I. L. R., 10 Calc., 1070.

Witnesses not to be kept waiting.—The evidence of witnesses should invariably be recorded as soon as possible after their attendance. If from unavoidable causes an adjournment is indispensable, there should be no unnecessary delay. Witnesses remaining over from one day should, as a rule, be examined at the first sitting of the Court on the following day. By this means the public will be put to no inconvenience, and justice will be administered in a prompt and satisfactory manner.

Chief Magistrates of Districts should carefully supervise the returns of their subordinates, as they will be held responsible for the correction of irregularities.—*Calc. H. C. C. O., No.* 12 *of* 27*th November* 1865, *Wilkins*, pp. 7, 8.

290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution.

Defence.

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He may then examine his witnesses (if any), and after their cross-examination and re-examination (if any) may sum up his case.

Act X of 1872, s. 251, para. 3; Act X of 1875, s. 62. It will be observed that this section expressly provides for the cross-examination of the witnesses for the defence. See notes to previous section.

If the accused makes any statement in defence, it ought to be recorded; if he does not voluntarily make any statement and declines to answer any question put by the Court, the fact should be noted, and when there is nothing else to show the nature of the defence, a note of the address to the Court, if any, should be recorded. The record is not complete, unless it shows the nature of the defence set up.—*In re Gopal Hajjam*, 15 W. R., Cr., 16.

In the trial of warrant-cases by Magistrates an accused may put in a written statement, and the Court is bound to record it.—*S.* 256, *ante*. There appears to be no reason why he should not do so in the High Court or Sessions Court.

Under s. 340, *post*, every person accused before any Criminal Court may of right be defended by a pleader. See s. 4 (*u*), *ante*.

Right of accused as to examination and summoning of witnesses.

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

Act X of 1872, s. 363; Act X of 1875, s. 85; Act IV of 1877, s. 91.

A prisoner is entitled, as a matter of right, to have any witnesses named in the list which he delivers to the Magistrate summoned and examined (*Queen* v. *Prosunno Coomar Moitro*, 23 W. R., Cr., 56; *Queen* v. *Bhooban Isher Gosamee*, 2 W. R., Cr., 6; *Queen* v. *Abdool Setar*, 3 W. R., Cr., 36); but he is not entitled as of right to have witnesses not named by him before the Magistrate summoned at the sessions trial.—*Queen* v. *Boidnath Singh*, 3 W. R., 29.

There is no reason to refuse an application for summons, simply because a large number of witnesses is mentioned therein.—*Harendro Narain Singh* v. *Bhobani Prea Babuani*, I. L. R., 11 Calc., 762.

Prosecutor's right of reply.

292. If the accused, or any of the accused, has stated, when asked under section 289, that he means to adduce evidence, the prosecutor shall be entitled to reply.

See Act X of 1872, s. 252; Act X of 1875, s. 63.

It was only where evidence was actually adduced on behalf of the accused that the prosecutor under the former Codes was entitled to a reply. Where, on being asked under this section, the accused has stated that he means to adduce evidence, but on further consideration does not do so, the Court is not at liberty to make a presumption adverse to the accused from the circumstance that he has not adduced evidence.—*Hurry Churn Chuckerbutty* v. *Empress*, 13 C. L. R., 358; (S.C.) I. L. R., 10 Calc., 140. In that case, at the close of the evidence for the prosecution, the attorney for the defence, in answer to the Judge, stated that he meant to call witnesses. The Court then adjourned; and, on the following day, the attorney stated that, on reconsideration, he did not intend to call witnesses. The Judge allowed the prosecution to reply. On appeal the High Court (PRINSEP and TOTTENHAM, JJ.) held that, although the strict interpretation of ss. 289 and 292 of the Code would warrant this course, it was never meant by the Legislature that the prosecutor should have a

[illegible] right to reply where one of several accused calls witnesses and the others do not

[illegible] where one of several accused persons tried jointly calls witnesses at the trial but the other accused call no witnesses, they must [illegible] follow in their defence and the prosecution have the right to reply on the whole case.

Queen Empress vs. [illegible] Narain & others

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reply when no witnesses are called for the defence, the object of the law being evidently to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecutor in such a case as that before them.

So it was held that the fact that the accused had, during the cross-examination of the witnesses for the prosecution, used certain documents, and that such documents had been put in evidence on his behalf did not entitle the prosecutor to the right of reply, if, when asked upon the close of the case for the prosecution, whether he meant to adduce evidence, the accused said that he did not.—*Empress* v. *Grees Chunder Banerjee*, I. L. R., 10 Calc., 1024.

View by jury or assessors.

293. Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place which shall be shown to them by a person appointed by the Court.

Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

Act X of 1872, s. 253; Act X of 1875, s. 64.

In cases of view by assessors of the scene of the alleged offence, the Judge cannot delegate his own function of examining witnesses on the spot to the assessors, who may not, under this section, speak to, or communicate with, any other person than the officer appointed to conduct them to the place.—*Queen* v. *Chutterdharee Singh*, 5 W. R., Cr., 59.

If the Court considers it necessary to visit the place of the alleged occurrence of an offence under trial, he should give notice to the parties, or in case of a trial by jury or with the aid of assessors, to the jury or assessors. See *Oudh Behari Narain Singh*, 1 C. L. R., 143.

When juror or assessor may be examined.

294. If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined, and re-examined in the same manner as any other witness.

Act X of 1872, s. 258; Act X of 1875, s. 69.

A person having to exercise judicial functions may give evidence in a case pending before him, when such evidence can and must be submitted to the independent judgment of other persons exercising similar judicial functions sitting with him at the same time.—*Queen* v. *Mooktu Sing*, 13 W. R., Cr., 60. In that case NORMAN, J., said: "I think it pretty clear that a prisoner has a right to have the evidence of a Sessions Judge who is trying him, taken on a point which he thinks makes in his favour. . . . . No doubt it is extremely inconvenient that a Judge sitting without a jury should try a case in which he himself is the complainant and principal witness. I should have no doubt that if he has any personal or pecuniary

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interest in the subject of the charge, he is disqualified from trying it. *But* if that is not the case, if the Judge in making the complaint has merely acted in discharge of his duty as a public officer, I think we must say that he is not incompetent to try the case."

See, as to disqualifying interest of a Magistrate or Judge, s. *555, infra*

295. If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

Jury or assessors to attend at adjourned sitting.

Act X of 1872, s. 260; Act X of 1875, s. 67.

Section 332, *post*, provides:—"Any person summoned to attend as a juror or as an assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court after being ordered to attend, shall be liable, by order of the Court of Session, to a fine not exceeding one hundred rupees. Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order. In default of recovery of the fine by such attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term." And s. 318 provides:—"Any person summoned under s. 315, s. 316 or s. 317, who without lawful excuse fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend, after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt, and be liable by order of the Judge to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment in the civil jail until the fine is paid."

296. The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day, and, subject to such rules, the presiding Judge may order whether, and in what manner, the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

Locking-up jury.

Act X of 1875, s. 65.

The following rule was made by the Bombay High Court under s. 65 of Act X of 1875:—

"In every case involving the punishment of death, or of transportation for life, in which the trial lasts for more than one day, the jury shall be kept together during the trial by the Sheriff or Deputy Sheriff, or such other officer as the presiding Judge may appoint for that purpose; and in every other case in which the trial shall last for more than one day, it shall be in the discretion of the presiding Judge whether the jury shall be kept together in manner aforesaid, or shall be allowed to return to their respective homes."—*Bombay Gazette*, 1875, p. 653.

F.—Conclusion of Trial in Cases tried by Jury.

297. In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecu-

Charge to jury.

tion and defence, and laying down the law by which the jury are to be guided. Ch. XXIII s. 298

Act X of 1872, s. 255, paras. 1 and 2; Act X of 1875, s. 90.

If the provisions of this section are neglected, and the Judge does not sum up the evidence at all, a new trial will be directed.—*Queen* v. *Shumshere Beg*, 9 W. R., Cr., 51.

A jury may be satisfied with a minimum of proof, and it is beyond the power of the High Court, in cases where the evidence is very slight, to interfere with the verdict. But when there is nothing which can, if believed, amount to proof, the Judge ought to charge the jury for an acquittal, and not leave the jury to say whether the prisoner is guilty or not (*Queen* v. *Greedharee Manjee*, 7 W. R., Cr., 39), or the case should not be put to the jury at all, as a verdict of guilty cannot, under such circumstances, be sustained at all.—*Queen* v. *Rutton Dass*, 16 W. R., Cr., 19. See s. 289, *supra*.

In charging a jury, a Sessions Judge should not tell them that the prisoner had previously been of bad character. That fact may be taken into consideration by a Sessions Judge in passing sentence when the prisoners are convicted (*Queen* v. *Kulum Sheikh*, 10 W. R., Cr., 39). Nor ought a Judge to introduce into his direction to the jury any question as to recommending a prisoner to mercy, but should leave that entirely to the jury.—*Queen* v. *Dossee Mosulmany*, 14 W. R., Cr., 46.

It is not necessary that the direction to the jury should be reduced to writing before delivery; but it is essential that the 'heads of charge' (s. 367) placed upon the record should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court, in the event of an appeal, to see distinctly whether the case was fairly and properly placed before the jury.—*Calc. H. C. C. M., No.* 2 *of* 4*th March* 1875, *Wilkins*, p. 117. It will be observed that the 3rd para. of s. 255 of Act X of 1872, directing that the statement of the Judge's direction to the jury shall form part of the record, has been omitted. Under s. 367, *post*, however, a Sessions Judge is bound to record the heads of the charge to the jury.

Sessions Judges should, in order to assist the inquiries of the District Magistrates regarding the cause of an acquittal in the Sessions Court, set forth clearly in the judgment what, in their opinion, has led to that result.—*Calc. H. C. C. O., No.* 5 *of* 21*st September* 1880, *Wilkins*, p. 116.

Duty of Judge.

298. In such cases, it is the duty of the Judge—

(*a*) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

(*b*) to decide upon the meaning and construction of all documents given in evidence at the trial;

(*c*) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

(*d*) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

Ch. XXIII s. 298 The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations.

(*a.*) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(*b.*) It is proposed to give secondary evidence of a document, the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

Act X of 1872, s. 256; Act X of 1875, s. 91.

As to what is meant by the relevancy of facts, see Evidence Act, I of 1872, s. 3, and Chap. II.

General duty of Judge.—In charging a jury, a Judge is not bound to do more than lay carefully and plainly before them the evidence as recorded by him, noting the discrepancies and inconsistencies, and pointing out generally the way in which it either favourably or unfavourably affects the person being tried.—*Queen* v. *Chunder Kumar Muzoomdar*, 25 W. R., Cr., 54. He ought not, however, to refer to discrepancies between the evidence given at the trial and statements made to and recorded by the police.—*Roghuni Singh*, 11 C. L. R., 569 (see s. 162, *supra*, which provides that such statements shall not be received in evidence). But he should state to the jury what are the principal points in the evidence, and how they bear for or against the prisoner, and in short, render the jury every assistance in his power towards coming to a right conclusion.—*Queen* v. *Bulakee Koormee*, 6 W. R., Cr., 72. While he is bound to advise the jury on questions of fact, and may tell the jury the impression which the evidence has made upon his own mind (*In re Dwarkanath Sen*, 13 W. R., Cr., 34), he has no right to pronounce his own judgment on the credibility of evidence, and to withdraw the consideration of the due weight to be given to the evidence from the jury.—*In re Hurroo Shaha*, 16 W. R., Cr., 20. And although it is open to the Judge in charging a jury to express his opinion as to the effect of any portion of the evidence, he should always be careful to add that it is for the jury to form their own opinion.—*Empress* v. *Bepin Biswas*, I. L. R., 10 Calc., 970.

A Judge should not give his opinion as to the guilt or innocence of a prisoner. He should merely give a general commentary on the evidence and a statement of what is the legal offence proved, should such evidence be credited.—*In re Bharut Chunder Christian*, 1 W. R., Cr., 2; *Queen* v. *Gunga Bishen*, *ib.*, 26. It is his duty to give a direction upon the law to the jury so far as to make them understand the law as bearing on the facts; and if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection.—*In re Jhubboo Mahton*, I. L. R., 8 Calc., 739; (S. C.) 12 C. L. R., 233, *per* Field, J.

In giving a warning to a jury not to disbelieve a mass of otherwise consistent evidence, because in one or two minor and immaterial points the witnesses made different statements, a Judge exercises a wise discretion, and affords no ground for an objection that he misdirected the jury.—*Queen* v. *Bustee Khan*, 7 W. R., Cr., 17.

Where a Sessions Judge left the jury to decide upon the age of a girl who had been kidnapped, merely aiding them with his own opinion, in which they expressed their concurrence, it was held that there was no misdirection.—*Queen* v. *Shama Khankee*, 7 W. R., Cr., 22.

A Judge should not leave it to the jury to find whether a communication is privileged or not, but should himself decide it as a point of law.—*Queen* v. *Chunder Kant Chuckerbutty*, 10 W. R., Cr., 14.

It has been considered that bare statements by prisoners are not admissible, and ought not to be alluded to by the Judge as evidence. Nor is evidence taken

before the Magistrate, unless it is contradictory of the evidence of the same witness as given before the Sessions Court, evidence in the trial, and it should not be put to the jury.—*Queen* v. *Bhekoo Singh*, 7 W. R.. Cr., 108. But, it has been held, the attention of the jury may be called to discrepancies between the evidence given by witnesses in such Court, and that given before the committing Magistrate without the depositions before the Magistrate being put in.—*Empress* v. *Haran Chunder Miller*, 6 C. L. R., 390. See *Queen* v. *Brindaban Bowree*, 5 W. R., Cr., 54, and notes to s. 288, *supra*. Ch. XXIII s. 298

When a prisoner is on his trial upon a charge of murder, it is the duty of the Judge to point out to the jury accurately the difference between murder and culpable homicide not amounting to murder, and to direct the attention of the jury to the evidence and to leave them to find the facts and say (under the direction of the Judge as regards the law) of what offence the prisoner is guilty.—*Queen* v. *Shumshere Beg*, 9 W. R., Cr., 51; see *Elahee Buksh, Appellant*, 5 W. R., Cr., 80. Where a Sessions Judge, in charging a jury in a case of culpable homicide not amounting to murder, omitted to draw their attention to the two classes of culpable homicide mentioned in s. 304 of the Penal Code, the High Court considered that the accused were found guilty of the lighter description, and sentenced the prisoner accordingly.—*Queen* v. *Kalichurn Dass*, 15 W. R., Cr., 17.

It was held to be a misdirection on the part of a Judge to comment on the evidence for the prosecution and to contrast it with the course followed by the prisoner (*e g.*, where he makes a simple denial of the charge coupled with a refusal to examine the witnesses in attendance), if the Judge leaves it to the jury to decide between the opposing statements and to credit whichever they think most worthy of belief.—*Queen* v. *Seetanath Ghosal*, 2 W. R., Cr., 60. On this point it will be useful to refer to the recent case of *Hurry Churn Chuckerbutty*, 13 C. L. R., 358; (S. C.) I. L. R., 10 Calc., 140—a case cited in the notes to s. 289, *supra*. In that case it was held that a prisoner, being at liberty to offer evidence or not as he thinks proper, no inference unfavourable to him could be drawn if he did not offer evidence.

The question of proof of previous convictions is one of fact, which ought to go to the jury and be determined by them.—*Queen* v. *Esan Chunder Dey*, 21 W. R., Cr., 40.

The duties of a Judge were thus stated by MARKBY, J., in the case of *Queen* v. *Nim Chund Mookerjee*, 20 W. R., Cr., 41: "So far as objections are taken to the summing up upon points of law, the High Court is bound to examine the Judge's observations with the greatest possible nicety, and to see that he has laid before the jury what the law is upon the case which they had to deal with, and that he has laid it down rightly. What a Judge says to a jury upon the law is an absolute and binding direction upon them. What he addresses to them upon the facts are only such observations as he thinks it necessary and proper to make in assisting them to arrive at a conclusion upon the evidence which it is wholly in their province to deal with as they think proper, and the observations which a Judge would make to a jury upon the facts would be determined by circumstances which must vary, one may almost say, in every case and in every tribunal in the country. They would vary in a very great degree according to the intelligence of the jury whom the Judge was addressing; they would also vary very much according as the case had or had not been fully discussed both for and against the prisoners by counsel prior to his addressing them. Had there been no discussion of a case by counsel, it would undoubtedly be necessary for the Judge to point out many things which, after the case had been fully discussed on both sides both for the Crown and for the prisoner, might well seem to him unnecessary. And, on the other hand, a Judge has very often to caution a jury against accepting without very careful consideration some of the suggestions that are made to them. When we are called upon to say whether or not the Judge has done his duty in addressing the jury on the facts, we must look to his summing up as a whole, and see that the case has been fairly laid before them."

It being incumbent upon the prosecution in a criminal case to produce all the evidence directly bearing on the charge or to account satisfactorily for the non-production of such evidence, it is the duty of the Judge to point out to the jury that if the prosecution do not call witnesses who, from their connection with the transaction, must be able to give important information, an inference adverse

Ch. XXIII s. 298 to the prosecution may be drawn unless sufficient reason is shown for not calling them, and the mere fact of their being summoned for the defence is not necessarily a sufficient reason. See *Dhunnoo Kazi* v. *Empress*, 10 C. L. R., 151; (S. C.) I. L. R., 8 Calc., 121. A Sessions Judge holding a second trial ought not to comment on the evidence of a previous trial.—*Jamsheer Sirdar*, 1 C. L. R., 62. See Evidence Act, I of 1872, s. 105; *In re Devi Dutt*, 7 C. L. R., 193.

Misdirection.—There must be a positive misdirection or some error of law in the summing up in order to induce the High Court to interfere. The omission of a Judge to point out to the jury the weakness of the evidence against the accused, and the possibility of other persons being the guilty parties, does not amount to a positive misdirection. Where there is some evidence to go to the jury, the Court cannot interfere.—*Queen* v. *Choonee*, 5 W. R., Cr., 13. So the omission of a Judge to enter into details regarding the identification of stolen property does not amount to a misdirection.—*Queen* v. *Madhab Mal*, 1 W. R., Cr., 22. It being the duty of the Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts, there is a misdirection if he does not give them an explanation sufficiently comprehensive to enable them to decide the particular issue.—*In re Jhubboo Mahton*, I. L. R., 8 Calc., 739; (S.C.) 12 C. L. R., 233, *per* FIELD, J.

The omission of a Sessions Judge to tell the jury that the statement of one prisoner was not evidence against his fellow-prisoner, was held to be a material error and fatal to the trial, notwithstanding that the Judge dealt with the evidence against each prisoner separately.—*Queen* v. *Sheik Miya Valad Daud*, 6 Bom. H. C. R., Cr., 10; see *Queen* v. *Elahee Buksh*, 5 W. R., Cr. Rul., 80. A confession of one prisoner is evidence against two co-prisoners tried jointly with him.—*Evidence Act, I of* 1872, *s.* 30. But to render a statement of one person tried jointly with another for the same offence admissible in evidence against that other, it is necessary that it should amount to a distinct confession of the offence charged.—*Nur Bux Kazi* v. *Empress*, I. L. R., 6 Calc, 279; (S.C.) 7 C. L. R., 385; *Empress* v. *Daji Narsu*, I. L. R., 6 Bom., 288. In the latter case, WEST, J., said: "It is obvious that Govinda (one of the prisoners) did not intend to criminate himself. His intention is to exculpate himself and make Daji the murderer of Narsu. When a person admits guilt to the fullest extent and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth, and the Legislature provides (see s. 30 of the Evidence Act) that his statement may be considered against his fellow-prisoners charged with the same crime. By exculpating himself Govinda fails to provide this guarantee, and his statement must be set aside in weighing the evidence against Daji." See further the note to s. 239, *supra*, and also the cases cited at the beginning of note to s. 287, *supra*.

A Judge has every right to call the attention of the jury to anything which appears to be a palpable alteration or blot on the face of a document alleged to be forged.—*Queen* v. *Kissor Mohun Dutt*, 17 W. R., Cr., 58.

Interference by High Court.—The High Court will set aside the verdict of a jury only in such cases where, by a misdirection to the jury, the accused has been materially prejudiced, or where there has been a failure of justice.—*Queen* v. *Rajcoomar Bose*, 19 W. R., Cr., 71; (S. C.) 10 B. L. R., Appx., 37. See s. 537, *infra*.

In summing up the case to the jury, the Judge omitted to call their attention to the evidence of the witnesses for the defence. On appeal on the ground of misdirection, the High Court considered this evidence to be untrustworthy, and held, that the summing up was not defective on account of this omission on the part of the Judge.—*In re Rochia Mohato*, I. L. R., 7 Calc., 42. In that case the High Court had the evidence for the defence read.

In the case of *Leiu Tu* v. *Empress*, I. L. R., 4 Calc., 10, three persons, who were alleged to have been attacked and wounded in an affray, informed the police on the same day that the persons who had attacked them were A, B, and C, and 18 days afterwards gave to the Magistrate inquiring into the case the names of four other persons as having with A, B, and C formed the attacking party. All seven were tried together before the Sessions Court, and the Judge omitted to call the attention of the jury that four out of the seven accused had not been mentioned until 18 days had passed over. This was held to be a misdirection.

In reviewing the charge of a Judge to a jury in the mofussil, it is sufficient to see whether the tendency of the charge taken as a whole has given a correct or incorrect direction to the mind of the jury, and it is not correct, it was said, to apply to such charge the criticisms which would be applied to a charge of a Judge in a Court in England.—*Queen* v. *Gogalao*, 12 W. R., Cr., 80. Ch. XXIII s. 298

Improper advice given by the Judge to the jury upon a question of fact, or the omission of the Judge to give that advice which a Judge in the exercise of a sound judicial discretion ought to give the jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty.—*Elahee Buksh, Appellant*, 5 W. R., Cr, 80, 92. Where a Judge in his charge to the jury admitted as receivable evidence a hearsay statement against the accused, and also an anonymous letter which was put in without an attempt to show how or by whom it was sent, it was held, that the jury had been misdirected and the accused prejudiced, and a new trial was ordered.—*Queen* v. *Chunder Koomar Mozoomdar*, 24 W. R., Cr., 77. In another case, the High Court set aside the verdict of a jury, because the Judge in summing up omitted to point out the absence of evidence very material to the case of the prosecution, and because he directed the jury to attribute an undue importance to the statements or excuses made by the prisoner in the explanation of certain documents.—*Queen* v. *Gunga Govind Palit*, 23 W. R., Cr., 21.

When different trials are held at different times and against different prisoners in respect of the same crime, the Judge should deliver a fresh charge on each trial; it is not sufficient for him at the subsequent trials to read over his first charge to the jury.—*Queen* v. *Mahadeo*, W. R., Sup. Vol., 15.

Accomplices.—A conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law. But the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require.—*Elahee Baksh, Appellant*, 5 W. R., Cr., 80. See also *Queen* v. *Nawabjan*, 8 W. R., 19; *Queen* v. *Shumshere Beg*, 9 W. R., Cr., 51; *Queen* v. *Kali Churn Gangooly*, 7 W. R., Cr., 2; *Queen* v. *Mohima Chunder Dass*, 15 W. R., Cr., 37; Evidence Act, I of 1872, ss. 30, 114, ill. (*b*), and 133; *Reg.* v. *Ramasami Padayachi*, I. L. R., 1 Mad., 394; and *Reg.* v. *Budhu Nanku*, I. L. R., 1 Bom., 475. See s. 337, *infra*.

A Judge may misdirect the jury as to what is corroboration of the testimony of an approver.—*Empress* v. *Bepin Biswas*, I. L. R., 10 Calc., 970. As to what is legal corroboration, see that case and *Reg.* v. *Mulapabin Kapana*, 11 Bom. H. C. R., 196; *Reg.* v. *Budhu Nanku*, I. L. R., 1 Bom., 475; *Reg.* v. *Jaffer Ali*, 19 W. R., Cr., 57; *Reg.* v. *Naga*, 23 W. R., Cr., 24; and *Empress* v. *Imdad Khan*, I. L. R., 8 All., 120, see p. 137.

In the case of *Queen* v. *Sadhu Mundul*, 21 W. R., Cr., 69, PHEAR, J., said:—"In the case of a trial by jury, it is the function of the jury to ascertain the facts upon the evidence before them, and for that purpose to be guided by the law which is applicable, and it is in all cases the duty of the Judge to point out to them that law. It was, therefore, in the present case, the duty of the Judge to lay before the jury substantially to the effect just set out the principles relative to the reception of accomplices' testimony, which the Legislature sanctioned by the Indian Evidence Act; and we think the Judge was wrong in telling the jury that this case was one in which no caution or instruction from him was needed on this head. It is, in all cases where an accomplice's testimony is admitted, incumbent on the Judge to inform the jury of the results of the law bearing on this point substantially as we have endeavoured to explain it." And s. 114, ill. (*b*), of the Evidence Act provides that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. The rule in that section coincides with the rule observed in England, that though the evidence of an accomplice should be carefully scanned and received with caution, and may be treated as unworthy of credit, yet if the jury or Court credits the evidence, a conviction proceeding upon it is not illegal. Section 133 of the Evidence Act in unmistakable term lays it down that a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice, and to hold that corroboration is necessary is to refuse

Ch. XXIII s. 299 to give effect to the section.—*Reg.* v. *Ramasami Padayachi*, I. L. R., 1 Mad., 394; and see *Reg.* v. *Budhu Nanku*, I. L. R., 1 Bom., 476.

In the case of *Joyudee Paramanick*, 7 C. L. R., 66, FIELD, J., expressed a grave doubt, whether the deposition of an approver taken before the committing Magistrate might be used as evidence against his accomplices on their trial before the Sessions Court, the conditional pardon of the approver having been withdrawn. A similar doubt was expressed by the Court (PRINSEP and TOTTENHAM, JJ.) in the case of *Nanha Malla* v. *Empress*, 13 C. L. R., 326. The Allahabad High Court, in the case of *Reg.* v. *Hardewar*, 5 All., 217, held, the evidence was not admissible.

* Duty of jury. **299.** It is the duty of the jury—

(*a*) to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned ;

(*b*) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not ;

(*c*) to decide all questions which, according to law, are to be deemed questions of fact ;

(*d*) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

(*a.*) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(*b.*) The question is, whether a person entertained a reasonable belief on a particular point,—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

Act X of 1872, s. 257; Act X of 1875, s. 93.

It was held by the majority of a Full Bench (JACKSON, J., dissenting), in the case of *Queen* v. *Mahomed Humayoon Shah*, 21 W. R., 72, that a charge in which the accused was charged with having made two contradictory statements in the course of a judicial proceeding was a good charge, and that (PHEAR and JACKSON, JJ., dissenting) the Court or jury, in convicting, need not, by direct evidence, find which of the two statements was false; all that was necessary being that the Court or jury should find that the allegations made on this charge were true.

In the case of *Queen* v. *Sadhu Mundul*, 21 W. R, Cr., 69, PHEAR, J., said:—"In the case of a trial by jury, it is the function of the jury to ascertain the facts upon the evidence before them, and for that purpose to be guided by the law which is applicable, and it is in all cases the duty of the Judge to point out to them that law."

The question of proof of previous conviction is one of fact, which ought to go to the jury and be determined by them.—*Queen* v. *Esan Chunder Dey*, 21 W. R, Cr., 40.

303. In a case for rioting with murder tried by a Session's Court the Jury convicted all the accused without specifying which common object they relied on, and were not asked, under section 303 Cr. P. Code any questions for the purpose of ascertaining what their verdict was. Held that the judge had misdirected the jury, and that the verdict of the jury, leaving it uncertain what was the common object which actuated the accused, it was bad in law, and the conviction must be set aside.

Wafidar Khan v. Queen Empress I. L. R. 21 Cal. C 955

Where the accused stated, in answer to a charge of murder, that he had killed his wife, but that he had done so in consequence of having discovered her in an act of adultery on the previous day, it was held that the statement did not amount to a plea of guilty, and that it was the duty of the Court, under cl. (c) of s. 298, to try whether the provocation disclosed was sufficiently grave and sudden to reduce the offence.—*Netai Luskar* v. *Empress*, I. L. R., 11 Calc., 410.

Retirement to consider.

300. In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury.

Act X of 1872, s. 263, para. 1; Act X of 1875, s. 92.

Delivery of verdict.

301. When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

Act X of 1872, s. 263, para. 1; Act X of 1875, s. 94.

Procedure where jury differ.

302. If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

Act X of 1872, s. 263, para. 3; Act X of 1872, s. 96.

Where a jury is not unanimous, the Judge is not bound to summon a new jury.—*Queen* v. *Urjoon Biswas*, 1 W. R., Cr., 41.

Where a jury is unanimous, their verdict must be received unless it be contrary to law: the Court is not competent in such a case to direct it to reconsider its verdict.—*Empress* v. *Mahuddi*, 6 C. L. R., 349; (S. C.) *Govt. of Bengal* v. *Mahuddi*, I. L. R., 5 Calc., 871.

Verdict to be given on each charge.

Judge may question jury.

303. Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

Questions and answers to be recorded.

Such questions and the answers to them shall be recorded.

See Act X of 1872, s. 263, para. 2; Act X of 1875, s. 95. The clause as to the direction of the Court is new.

Section 238, *supra*, also enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those parts constitute a minor offence.—*Govt. of Bengal* v. *Mahaddi*, I. L. R., 5 Calc., 871; (S. C.) 6 C. L. R., 349. There the accused were charged under s. 149, coupled with s. 325 of the Penal Code, with, while being members of an unlawful assembly, committing grievous hurt. The jury disbelieved the evidence as to the unlawful assembly, but unanimously found two of the accused guilty of grievous hurt, and it was held that the verdict was legally sustainable, although that offence did not form the subject

Ch. XXIII s. 303 of a separate charge. See remarks of SARGENT, C. J.—*Empress* v. *Appa Subhana Mendre*, I. L. R., 8 Bom., 200; and *Empress* v. *Harai Mirdha*, I. L. R., 3 Calc., 189.

In *Reg.* v. *Mahomed Hoomayoon Shaw*, 13 B. L. R., 324, where a person was convicted of giving false evidence upon an alternative charge, the majority of the Full Bench (JACKSON and PHEAR, JJ., dissenting) held, that the conviction was good, notwithstanding that the jury had not distinctly found which of the two statements was false. JACKSON, J., was of opinion that such a charge was bad, and further, that an alternative finding upon such a charge was invalid, while PHEAR, J., considered that although a person might be lawfully tried upon such a charge, the jury or the Court must, for a conviction, find specifically which branch of the alternative was true.

Where perjury is assigned upon a distinct allegation, the evidence of its falsity must be regularly taken in the case in which it is tried. If the whole proof consists of two conflicting statements, an alternative charge and finding are the regular course.—*Mad. H. C. Pro.*, *30th November* 1874, *Weir*, p. 5; *Proceedings*, 4 *Mad. H. C. R.*, 1874, *Weir*, pp. 4, 5. See notes to ss. 236—8. See also notes to s. 307, *post*. But s. 236 applies to cases in which, not the facts are doubtful, but the application of the law to the facts is doubtful. Judgment in the alternative cannot be passed in cases in which it is doubtful whether the accused person is guilty of any one of the several offences charged, but where it is doubtful of which of those offences he is guilty.—*Queen* v. *Jumurha*, 7 N. W. P., 137.

The law does not prescribe any specific form in which the jury are to return their finding; they are at liberty, therefore, to deliver it in any form which they think fit, and if that finding is not exhaustive as to the facts in issue which go to make up the charge or charges, it is the duty of the Judge to put such questions as shall elicit a complete finding.—*Queen* v. *Hari Prosad Gangooly*, 8 B. L. R., 557.

In the case of *Queen* v. *Wuzir Mundul*, 25 W. R., Cr., 25, MACPHERSON and MORRIS, JJ., laid it down as a rule, that the verdict of a jury "should not be interfered with except when there has been a gross and unmistakable miscarriage of justice" (p. 27). See also *Queen* v. *Ram Churn Ghose*, 20 W. R, 33; *Queen* v. *Sham Bagdee*, 20 W. R., 73; *Queen* v. *Hurro Manjhee*, 21 W. R., Cr., 4; (S. C.) 14 B. L. R., Appx., 2; *Queen* v. *Nobin Chunder Banerjee*, 20 W. R., Cr., 70; *Queen* v. *Khanderav Bajirav*, I. L. R., 1 Bom., 10; *Empress* v. *Behari Lall Bose*, 6 C. L. R., 431; *Empress* v. *Mahuddi*, 6 C. L. R., 349. See further notes to s. 307, *infra*. In the case of *Empress* v. *Mukhun Kumar*, 1 C. L. R., 275, it was held, *per* GARTH, C. J., and PRINSEP, J. (MARKBY, J., *contra*), that the rule laid down in *Queen* v. *Wuzir Mundul*, 25 W. R., Cr. Rul, 25, went too far; *per* PRINSEP, J. (MARKBY, J., *contra*), that the law did not prevent a Sessions Judge from asking a jury regarding the grounds of their verdict, and that such a course was desirable for the ends of justice.

It is only when it is necessary in order to ascertain what the verdict of the jury really is, that the Judge is justified in putting questions to the jury. Unless a necessity of this kind truly exists, the questions are not justified in law. No doubt the Legislature thought that it would be very dangerous to give the Sessions Court the power of cross-examining the jury after they had delivered their final verdict with a view to show that the conclusions at which they had arrived were not logical or were inconsistent, or in order to provide materials upon which the Judge might be enabled afterwards to dispute the finality of the verdict. But where it appeared from the answers which the foreman returned upon being asked to give the verdict of the jury on the first charge that there was at the time some lurking uncertainty in the minds of the jury themselves with regard to their verdict, and this uncertainty made itself apparent to the Judge, he was held to have acted rightly in putting questions to them with a view of ascertaining what their verdict really was.—*Queen* v. *Sustiram Mandal*, 21 W. R., Cr., 1, *per* PHEAR, J.

In the case of *Empress* v. *Dhunum Kazee*, I. L. R., 9 Calc., 53; (S. C.) 11 C. L. R., 169, the jury returned a simple verdict of "not guilty." NORRIS, J., said: "In this case the jury had returned a plain simple verdict of 'not guilty;' it may have been erroneous, but it certainly was not ambiguous, and the duty of the Judge was to receive it and record it without asking any question about it"—p. 61. See cases cited by NORRIS, J.

In a trial upon charges of culpable homicide not amounting to murder under s. 304, and voluntarily causing grievous hurt under s. 325 of the Indian Penal Code, the Sessions Judge, in summing up, clearly contemplated a conviction on the first charge, but the jury, after a short retirement, stated that they were unanimous for an acquittal, and were divided on the other charge. The Judge thereupon inquired what the majority was, and on being informed that it was 3 to 2, asked what the verdict of the majority was. The answer was "guilty," and the Judge at once accepted the verdict. The High Court held on appeal that it was not intended under this section that a Judge, on ascertaining that a jury was not unanimous, should make inquiries to learn the nature of the majority and its opinion, so that he should have an opportunity of accepting or refusing that opinion as a verdict according as it coincided with his own opinion or not.—*Hurry Churn Chuckerbutty* v. *Empress*, 13 C. L. R., 358; (S. C.) I. L. R., 10 Calc., 140.

See *Reg.* v. *Hari Prasad Gangooly*, 8 B. L. R., 557.

304. When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

Amending verdict.

This is new.

In the case of *The Queen* v. *Vodden*, Dear's C. C., 229, one of the jurors delivered a verdict, which was entered as not guilty. The prisoner was discharged out of the dock. Immediately he was discharged, and before the jury had left the box, others of the jury interfered and said the verdict was guilty. The prisoner was brought back to the dock, and the jury were again asked for their verdict. They all answered guilty, and this verdict was recorded. It was held that the mistake had been properly corrected.

305. When in a case tried before a High Court the jury are unanimous in their opinion, or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

Verdict in High Court when to prevail.

When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

Discharge of jury in other cases.

If the Judge disagrees with the majority, he shall at once discharge the jury.

If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury.

Act X of 1875, ss. 97, 98.

It is only when the jury is not unanimous that a Sessions Court may require it to retire for further consideration. When a verdict is unanimous, it must be received by the Judge unless contrary to law. Where a Judge dissents from an unanimous finding of a jury given in accordance with law, the only procedure open to him to follow is that laid down in s. 307. See *Empress* v. *Mahuddi*, I. L. R., 5 Calc., 871; (S. C.) 6 C. L. R., 349.

See s. 310, *infra*, in cases where the charge is of an offence committed after a previous conviction.

Ch. XXIII secs. 304-307

306. When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

Verdict in Court of Session when to prevail.

If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall pass sentence on him according to law.

Act X of 1872, s. 263, para. 4, as amended by Act XI of 1874, s. 21.

Although this section leaves the discretion of the Judge absolutely uncontrolled, the Court ought not to interfere with the unanimous verdict of a jury unless the verdict be palpably and perversely wrong.—*Empress* v. *Behari Lall Bose*, 6 C. L. R., 431; *Empress* v. *Mahuddi*, 6 C. L. R., 349; (S. C.) I. L. R., 5 Calc., 871. See notes to s. 303, *supra*.

A Court is bound to pass some sentence if it records a verdict of guilty, though the sentence may be only nominal (*Mad. H. C. Pro.*, 12*th Aug.* 1869, *Weir*, p. 37); but a Judge is not warranted in passing a merely nominal sentence, because he cannot concur in a jury's verdict of guilty. In doing so, he would usurp the functions of a jury. He is bound to pass a sentence adequate to the offence found by the jury to have been committed.—*Mad. H. C. Pro.*, 8*th November* 1866, *Weir*, p. 37. If he dissents from the finding of the jury, he must follow the procedure laid down by the next section.—*Empress* v. *Mahuddi*, I. L. R., 5 Calc., 871; (S. C.) 6 C. L. R., 349.

See s. 310, *infra*, in cases where the charge is of an offence committed after a previous conviction.

307. If in any such case the Sessions Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which the accused has been tried, ~~so completely that he considers it~~ and so clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed.

Procedure where Sessions Judge disagrees with verdict.

Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which the accused has been tried, but he may either remand the accused to custody or admit him to bail.

In dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal; * ~~but it may~~ * acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

substituted

Act X of 1872, s. 263, paras. 5 and 6; Act XI of 1874, s. 21.

* and subject thereto it shall after considering the entire evidence and after giving due weight to the opinions of the sessions Judge and the jury"

Paragraph 6 of s. 263 of Act X of 1872 provided that "the High Court shall deal with the case so submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts as well as law without reference to the particular charges as to which the Court of Session may have disagreed with the verdict, and if it convict him, shall pass such sentence as might have been passed by the Court of Session." The alteration made in this paragraph seems to have been suggested by the decision of the High Court in the case of *Empress* v. *Harai Mirdha*, I. L. R., 3 Calc., 189, where MARKBY, J, said: "Whatever may be the exact position of this Court in dealing with a reference of this kind under s. 263, as to which we express no opinion, we feel no doubt whatever that this Court has a right to convict a prisoner of any offence which the jury could have convicted him of upon the charge framed and placed before them. Upon the charges framed and placed before the jury in this case, the jury could have convicted these prisoners (who were charged under ss. 302, 149 and 326 and 149 of the Penal Code) of an offence under s. 143. We, therefore, undoubtedly possess that power ourselves." Ch. XXIII s. 307

Where a Judge dissents from the unanimous finding of a jury given in accordance with law, the only procedure open to him is to follow that laid down by this section. An unanimous verdict must be received by the Judge unless contrary to law.—*Empress* v. *Mahuddi*, I. L. R., 5 Calc., 871; (S. C.) 6 C. L. R., 349; *Hurri Churn Chuckerbutty* v. *Empress*, 13 C. L. R., 358, see p. 363; (S. C.) I. L. R., 10 Calc., 140. So, in a trial by a jury before a Court of Session upon charges some of which were triable by a jury and some with the aid of assessors, the jury, by a majority, having returned a verdict of not guilty on all the charges, the Judge, who disagreed with the verdict, treated the trial of the charges which were triable with the aid of assessors as if they had been so tried, and convicted the accused persons. On appeal it was held, that it was the duty of the Judge to have accepted the verdict as one of acquittal, and then to have passed orders in accordance with s. 263 of Act X of 1872.—*In re Bhootnath Dey, Appellant*, 4 C. L. R., 405.

Where a Sessions Judge has approved of a verdict on certain charges and finally acquitted and discharged the prisoner as to those charges, the High Court cannot, under this section, convict on those very charges. The section, it was held, contemplates only a case in which, without recording any order of acquittal or conviction, the Sessions Judge refers the whole case.—*Reg.* v. *Udya Changa*, 20 W. R., Cr., 73.

The disagreement referred to in this section must be such a complete dissent as to lead the Judge to consider it necessary, for the ends of justice, to submit the case to the High Court.—*Imperatrix* v. *Bhawani bin Panduji*, I. L. R., 2 Bom., 525.

When the jury is not unanimous in their finding, and the Judge dissents from the opinions expressed by them, the High Court is competent, on the case being referred under this section, to find the prisoner guilty, notwithstanding an acquittal by the majority of the jury.—*Empress* v. *Sahae Rae*, I. L. R., 3 Calc., 623. In such a case it is the duty of the Judge, in sending up the matter to the High Court, to state the offence which has, in his opinion, been committed.—*Ibid*; see also *In re Tiluckdharee*, 2 C. L. R., 1; *Queen* v. *Nobin Chunder Banerjee*, 20 W. R., Cr., 70. On the other hand, the High Court can acquit the prisoner, if it so think fit, on the facts, notwithstanding that the jury has found the prisoner guilty (*Queen* v. *Koonjo Leth*, 11 B. L. R., 14; (S. C.) 20 W. R., Cr., 1; *Queen* v. *Sidham Sircar*, *ib*, 16); but the Court should exercise the powers vested in it only in cases in which it finds the verdict of the jury clearly and undoubtedly wrong.—*Queen* v. *Sham Bagdi*, 13 B. L. R., Appx., 19; *Queen* v. *Doorjodhun Shamonto*, 19 W. R., Cr., 45; *Queen* v. *Nobin Chunder Banerjee*, 20 W. R., Cr., 70; *Queen* v. *Mussamut Itwarya*, 14 B. L. R., Appx., 1; *Queen* v. *Hurro Manji*, 14 B. L. R., Appx., 2; (S. C.) 21 W. R., Cr., 4; *Empress* v. *Harai Mirdha*, I. L. R., 3 Calc., 189. In the case of *Queen* v. *Wuzir Mundul*, 25 W. R., Cr., 25, the Court (MACPHERSON and MORRIS, JJ.) said, that "the verdict of a jury should not be interfered with except when there has been a gross and unmistakable miscarriage of justice." In the case of *The Empress* v. *Mukhun Kumar*, 1 C. L. R., 283, GARTH, C. J., and PRINSEP, J. (MARKBY, J., dissenting), considered that this ruling went too far, GARTH, C. J., saying—"It appears to me that by the section the Legislature intended to vest in the High Court a very large discretion, and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled.

Ch. XXIII s. 307 The verdict of a jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried, and of hearing the witnesses examined, ought always, in my opinion, to command its proper weight; and the more unanimous a verdict may be, and the less likely to have been induced or influenced by prejudice or error, the more entitled it should be to our respect and consideration. But there may be many occasions where, as it seems to me, little or no weight should be attached to their verdict; as for instance, where, out of a jury of five, three are of one way of thinking and two of another, and the presiding Judge agrees with the minority; or where it is manifest, from the verdict of the jury or otherwise, that their minds have been influenced by prejudice which has prevented them from forming a correct judgment."

Where there were reasons sufficient to warrant a jury in disbelieving the witnesses, the High Court refused to interfere on a reference under this section, as it was not shown that the verdict of the jury was certainly unreasonable and perverse. —*In the matter of Hurree Narain Mookerjee*, 2 C. L. R., 518.

In the case of *In re Tiluckdharee*, 2 C. L. R., 1, where four out of five jurors acquitted the prisoner on a charge of attempt to commit rape, and the Sessions Judge, disagreeing with the verdict, referred the case to the High Court, that Court found that the evidence for the prosecution was fully worthy of belief and sentenced the prisoner.

A Sessions Judge ought to record distinctly whether or not he agrees with the verdict of the jury.—*Queen* v. *Chand Bagdee*, 7 W. R., Cr., 6.

As stated by GARTH, C. J., a very large discretionary power is vested in the High Court by this section, and no fixed rules can be laid down for the exercise of that discretion in every instance, and the decision in each instance must depend upon its own peculiar circumstances.—*Empress* v. *Mukhun Kumar*, 1 C. L. R., 275. The duty of both Judge and jury is, in fact, cast upon the High Court.—*Reg.* v. *Khanderav Bajirav*, I. L. R., 1 Bom., 10. In that case WEST, J., speaking of the difference of the positions of the High Court and the Courts in England, said: "Notwithstanding this difference and the more onerous duties devolving in consequence on the High Courts in India, we still desire to be guided, as far as may be, by the analogies of the English law. It is a well-recognized principle that the Courts of England will not set aside the verdict of a jury unless it be perverse and patently wrong, or may have been induced by an error of the Judge. We adhere generally to this principle." See *Empress* v. *Dhunum Kazee*, I. L. R., 9 Calc., 53; (S. C.) 13 C. L. R., 169. So it was stated to be the rule of the High Court in Calcutta, not to interfere with the finding of a jury, unless their verdict is shown to be manifestly erroneous.—*Empress* v. *Jacquiet*, I. L. R., 11 Calc., 85.

Where the Court is asked to set aside a verdict, because it is against the weight of evidence, the question is not whether the Judge who tried the case was or was not satisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to.—*Empress* v. *Dhunum Kazee*, I. L. R., 9 Calc., 53; (S. C.) 13 C. L. R., 169. See *Solomon* v. *Bitton*, L. R., 8 Q. B. Div., 176.

The words "shall deal with the case so submitted as with an appeal," in s. 263 of Act X of 1872, which are similar to the words used in the last paragraph of this section, were construed by PHEAR, J., in the case of *Queen* v. *Koonjo Leth*, 11 B. L. R., 19, as simply directing the procedure to be followed,—*e.g.*, as regards the notices to be served, and so on. The Court, therefore, might send for additional evidence and deal with the case generally as provided in Chap. XXXI with regard to appeals. The result of this construction is, that the prisoner is in a better position with regard to an appeal, if that appeal be made through the intervention of the Judge under this section than if he had preferred it himself, because s. 418, *infra*, says that, if the conviction was in a trial by jury, the appeal by the person convicted shall be admissible on a matter of law only.

See also notes to s. 303.

Instructions as to references to High Court, when Sessions Judge disagrees with Jury.—In cases in which the Sessions Judge has disagreed with the verdict of the jury, no delay should be permitted to occur in the submission of the records with the Sessions Judge's letter of reference. It is open to the Government pleader, and to the pleader for the accused, to make notes of the evidence as the case pro-

ceeds. If, after the trial is concluded, copies of any part of the proceedings are required, it will be necessary that they should be made, on application, in the High Court, after receipt of the record.—*Calc. H. C. C. O., No.* 2 *of* 23*rd March* 1878, *Wilkins*, p. 115.

G.—Re-trial of Accused after Discharge of Jury.

Re-trial of accused after discharge of jury.

308. Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury, unless the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

Act X of 1875, s. 100.

H.—Conclusion of Trial in Cases tried with Assessors.

Delivery of opinions of assessors.

309. When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

Judgment.

The Judge shall then give judgment; but in doing so shall not be bound to conform to the opinions of the assessors.

If the accused is convicted, the Judge shall pass sentence on him according to law.

Act X of 1872, s. 255, para. 1, ss. 261, 262.

The proviso as to summing up is new, and gets rid of a difficulty which was raised in the case of *Reg.* v. *Ameeroddeen*, 15 W. R., Cr., 25; (S.C.) 7 B. L. R., 63.

The power of summing up the evidence is intended to be exercised in long or intricate cases, and the Sessions Judge should confine himself to summing up the evidence and should not obtrude on the assessors his opinion of the worthlessness or otherwise of any portion of the evidence.—*Shadulla Howladar* v. *Empress*, I. L. R., 9 Calc., 875; (S. C.) 12 C. L. R., 506.

The section does not require that the summing up or heads of the summing up should be recorded, but in the case of *Shadulla Howladar* v. *Empress*, I. L. R., 9 Calc., 875; (S. C.) 12 C. L. R., 506, where the summing up was recorded by the pleader for the prosecutor and accepted by the Judge, PRINSEP, J., said: "We think that such a course should not have been taken by the Judge, and that if he was incapable of recording the heads of his summing up to the assessors, he should have availed himself of the services of some Court officials or directed it to be done by some independent person." It must be borne in mind that, under s. 367, *post*, the heads of charge to a jury must be recorded by the Sessions Judge.

The judgment need not be pronounced at once. Section 366, *infra*, provides that, in every trial in any Court of original jurisdiction, judgment shall be pronounced in open Court either immediately or at some subsequent time, of which due notice shall be given to the parties or their pleaders.

Where, after the assessors had given their opinions, the Judge left the district without recording his finding or his judgment, and his successor, after considering the evidence which had been taken at the trial, convicted and passed sentence on the prisoners, the conviction and sentence were set aside and the prisoners ordered to be retried.—*Queen* v. *Gopi Noshyo*, 21 W. R., Cr, 47.

The intention of the Legislature was, where a prisoner is tried on two or more charges, that the assessors should give a definite opinion whether the prisoner is guilty of any, and, if so, of which of the charges preferred against him, and that the Judge, in delivering his judgment, should give it with advertence to the opinion of the assessors.—*Queen* v. *Matam Mal*, 22 W. R., Cr., 34.

The Sessions Judge should conform strictly to the terms of the section and require each assessor to state his opinion orally (*Shadulla Hawladur* v. *Empress*, I. L. R., 9 Calc., 875; (S. C.) 12 C.L.R., 506); and the grounds of their opinions should be distinctly recorded.—*Queen* v. *Mussamat Mina Nuggerbhatin*, 3 W. R., Cr., 6.

In *Reg.* v. *Kala Karsan*, 6 Bom. H. C. R., Cr., 55, it was held, that the Judge's omission in a trial conducted with the aid of assessors to state the ground of his decision was not an irregularity which invalidated the conviction. But see *Queen* v. *Shumshere Beg*, 9 W. R., Cr. Rul., 51; *Bhugwan* v. *Doyal Gope*, 10 *ibid*, 7.

Opinion of Assessors how to be recorded.—The record of the opinion of each assessor should appear at the commencement of the judgment of the Sessions Judge. It is not, in the Court's opinion, sufficient that this record should contain a mere verdict of guilty or not guilty, or proven or not proven; what the Court requires is not only the result arrived at by each assessor sitting on a Sessions trial, but, if possible, the reasons by which each assessor arrived at that result,—that is, the grounds of his opinion. While avoiding prolixity, a Sessions Judge should be careful to be intelligible and precise in recording such opinions.—*Calc. H. C. C. O., No.* 4 *of 23rd June* 1865, *Wilkins*, p. 115. See *Queen* v. *Mussamat Mina Nuggerbhatin*, 3 W. R., Cr., 6.

See s. 310, *infra*, as to cases in which the charge is of an offence committed after a previous conviction.

I.—Procedure in case of previous Conviction.

Procedure in case of previous conviction.

310. In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence committed after a previous conviction for any offence, the procedure laid down in sections 271, 286, 305, 306, and 309 shall be modified as follows:—

(*a.*) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge, unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence.

(*b.*) If he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge.

(*c.*) If he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly; but if he denies that he has been so previously convicted, or refuses to, or does not, answer such question, the jury or the Court and the assessors (as the case may be) shall then inquire concerning such previous conviction, and in such case (where the trial is by jury) it shall not be necessary to swear the jurors again.

This section is new. The object is to prevent the jury or assessors from being biased against the accused by the knowledge that he is an old offender.

310. The following has been added to this section by § 9 Act III of 1891.

* "notwithstanding any thing in this section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act 1872"

It has now been held that, in trials before a jury or with the aid of assessors, the record should invariably show that reference to a previous conviction was not made until the accused had been convicted of the subsequent offence (*Kristo Behari Das* v. *Empress*, 12 C. L. R., 555, *per* CUNNINGHAM and MACLEAN, JJ.); but in the case of *Bepin Behary Shaw* v. *Empress*, 13 C. L. R., 110, where a Sessions Judge, in a trial by jury, called upon the accused to answer at the same time a charge of theft and also a charge of having been previously convicted, the High Court refused to interfere, as it did not appear that there had been a failure of justice caused by the irregularity.

J.—List of Jurors for High Court, and summoning Jurors for that Court.

Jurors' book.

311. In each Presidency-town, the jurors' book for the year current when this Code comes into force shall be taken as containing a correct list of persons liable to serve as jurors under this chapter.

Exemption of special jurors.

Those persons whose names are entered in the jurors' book as being liable to serve on special juries only shall be deemed to be persons privileged and liable to serve only as special jurors under this chapter during the year for which the said list has been prepared.

See Act X of 1875, ss. 39, 41.

For rules as to list of jurors in the High Court at Calcutta, see *Belchambers's Rules and Orders*, pp. 256—267.

Number of special jurors.

312. The names of not more than ~~two~~ hundred persons shall at any one time be entered in the special jurors' list.

Act X of 1875, s. 40.

Lists of common and special jurors.

313. The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

(*a*) a list of all persons liable to serve as common jurors; and

(*b*) a list of persons liable to serve as special jurors only.

Regard shall be had, in the preparation of the latter list, to the property, character, and education of the persons whose names are entered therein.

No person shall be entitled to have his name entered in the special jurors' list, merely because he may have been entered in the special jurors' list for a previous year.

The Governor-General in Council in the case of the High Court at Calcutta, and, in the case of other High Courts,

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the Local Government, may exempt any salaried officer of Government from serving as a juror.

Discretion of officer preparing lists.

The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said lists as seems to him to be proper, and there shall be no appeal from, or review of, his decision.

Act X of 1875, ss. 42, 43.

District Locomotive Superintendents and Assistant Locomotive Superintendents on the East Indian Railway are exempted from liability to serve as jurors or assessors in criminal trials in the N. W. Provinces.—*N. W. P. Gazette*, 1875, p. 1076. And the following officials of the Oudh and Rohilkund Railway are also exempted:—Engineers in charge of the open line; engineering inspectors employed on the open line; locomotive foremen and drivers in charge at changing stations; drivers of pilot engines; and station masters.—*N. W. P. Gazette*, 1875, p. 171.

The following persons are exempted from serving on juries in the mofussil in the Madras Presidency:—The Agent, the Chief Accountant, and the Cash-keeper of every branch of the Madras Bank (*Madras Notification*, 19*th Feby*. 1874, *Weir*, p. 76); all officers and subordinates of the Public Works Department while actually in charge of public works ranges (*Madras Notification*, 23*rd March* 1876, *Weir*, p. 76); and Railway Engineers in charge of sections of railways open for public traffic (*Madras Notification*, 28*th July* 1876, *Weir*, p. 76).

Publication of lists, preliminary and revised.

314. Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the local official Gazette before the fifteenth day of April next after their preparation.

Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the local official Gazette before the first day of May next after their preparation.

Copies of the said lists shall be affixed to some conspicuous part of the court-house.

Act X of 1875, s. 44.

Number of jurors to be summoned in Presidency-town.

315. Out of the persons named in the revised lists aforesaid, there shall be summoned for each sessions in each Presidency-town at least twenty-seven of those who are liable to serve on special juries, and fifty-four of those who are liable to serve on common juries.

No person shall be so summoned more than once in six months unless the number cannot be made up without him.

Supplementary summons.

If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

Act X of 1875, s. 45.

316. Whenever a High Court has given notice of its intention to hold sittings at any place outside the Presidency-towns for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

Summoning jurors outside the Presidency-towns.

Act X of 1875, s. 50.

317. In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of Commissioned and Non-commissioned officers in Her Majesty's Army resident within ten miles of its place of sitting, as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

Military jurors.

All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code ; but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent military duty, or for any other special military reason.

Act X of 1875, s. 51. See note to s. 320, *infra*.

318. Any person summoned under section 315, section 316 or section 317, who without lawful excuse fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable by order of the Judge to such fine as he thinks fit ; and in default of payment of such fine, to imprisonment in the civil jail until the fine is paid.

Failure of jurors to attend.

Act X of 1875, s. 46. See s. 332, *post*, and s. 295, *supra*.

K.—List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court.

319. All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside.

Liability to serve as jurors or assessors.

Act X of 1872, s. 404.

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Exemptions.

*320. The following persons are exempt from liability to serve as jurors or assessors, namely :—

(*a*) Officers in civil employ superior in rank to a District Magistrate ;

(*b*) Judges ;

(*c*) Commissioners and Collectors of Revenue or Customs ;

(*d*) Persons engaged in the Preventive Service in the Customs Department ;

(*e*) Persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty ;

(*f*) Persons actually officiating as priests or ministers of their respective religions ;

(*g*) Persons in Her Majesty's Army, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors ;

(*h*) Surgeons and others who openly and constantly practice the medical profession ;

(*i*) Persons employed in the Post-office and Telegraph Departments ;

(*j*) Persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641 ;

(*k*) Other persons exempted by the Local Government from liability to serve as jurors or assessors.

Act X of 1872, ss. 405, 406, para. 1. The last three clauses of s. 406 have been omitted from this Code.

In the Panjab, under s. 30 of Act IV of 1866, military men are not exempt, when summoned by the Chief Court, from serving as jurors, unless their Commanding Officer desires to have them excused on the ground of urgent military duty, or for any other special military reason. See s. 317, *supra*.

District Locomotive Superintendents and Assistant Locomotive Superintendents on the East Indian Railway are exempted from liability to serve as jurors or assessors in criminal trials in the N. W. Provinces.—*N. W. P. Gazette*, 1875, p. 1076. And the following officials of the Oudh and Rohilkund Railway are also exempted :—Engineers in charge of the open line ; engineering inspectors employed on the open line; locomotive foremen and drivers in charge at changing stations ; drivers of pilot engines ; and station masters.—*N. W. P. Gazette*, 1875, p. 171.

The following persons are exempted from serving on juries in the mofussil in the Madras Presidency :—The Agent, the Chief Accountant, and the Cash-keeper of every branch of the Madras Bank (*Madras Notification*, 19*th Feby.* 1874, *Weir*, p. 76) ; all officers and subordinates of the Public Works Department while actually in charge of public works ranges (*Madras Notification*, 23*rd March* 1876, *Weir*, p. 76) ; and Railway Engineers in charge of sections of railways open for public traffic (*Madras Notification*, 28*th July* 1876, *Weir*, p. 76).

As to grounds of objection to persons summoned as jurors, see s. 278, *supra*.

See ss. 329, 462, *infra*.

321. The Sessions Judge, and the Collector of the District or such other officer as the Local Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278, clauses (*b*) to (*h*), both inclusive.

List of jurors and assessors.

The list shall contain the name, place of abode, and quality or business of every such person; and if the person is an European or an American, the list shall mention the race to which he belongs.

Compare s. 400 of Act X of 1872. That section provided that the list should be of persons residing within ten miles from the place where trials before the Court of Session are held, or within such other distance as the Local Government should think fit to direct. Under this section, it will be seen that no such limits are prescribed, and consequently all persons liable to serve as jurors in the district where the sessions are held are liable to be summoned. See s. 319, *supra*.

The following rules are in force in Bombay:—

It has been brought to the notice of Government that sufficient care is not always taken in the preparation and revision of these lists; many persons, such as officers in the service of Government, pensioners, &c., who would make the best class of assessors, being omitted, while, on the other hand, persons of tainted reputation, and otherwise clearly unfit, are sometimes included.

Government consider it most important that the duty of preparing and revising these lists should be properly performed, with a view to obtaining the services, as assessors, of a sufficient number of respectable and really intelligent men of all classes, and wish it to be understood that this duty should be performed by the Collectors themselves with the aid of their assistants, and on no account delegated to uninstructed and irresponsible subordinates.

It is also very desirable to improve the position of assessors in public estimation, and to make the duty as little irksome as possible to individuals. No assessor should, therefore, be summoned too frequently; he should be summoned formally and regularly, and be treated with consideration and respect during his attendance at the station. And Collectors should be careful to represent and practically to regard the duty of an assessor as one of responsibility and trust, and to make the assessors feel that their co-operation in the administration of justice is sought for as a means of conferring a benefit upon their countrymen, and not merely to assist the Judges in their labours.—*Bombay H. C. Cir.*, 48.

322. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid, and in the court-houses of the District Magistrate and of the District Court, and in some conspicuous place in the town or towns in or near which the persons named in the list reside.

Publication of list.

Act X of 1872, s. 401, para. 1.

323. To every such copy shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the

Objections to list.

Sessions court-house, and at a time to be mentioned in the notice.

Act X of 1872, s. 401, para. 2.

Revision of list.

324. For the hearing of such objections, the Sessions Judge shall sit with the Collector or other officer as aforesaid, and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror or as an assessor, or who may establish his right to any exemption from service given by section 320, and insert the name of any person omitted from the list whom they deem qualified for such service.

In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list.

A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

Act X of 1872, s. 402. The last clause is new.
See s. 537, *infra*.

Annual revision of list.

325. The list so prepared and revised shall be again revised once in every year.

The list so revised shall be deemed a new list, and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

Act X of 1872, s. 403.

325A

District Magistrate to summon jurors and assessors.

326. The Sessions Judge shall ordinarily, three days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial.

325A In the case of any district for which the Local Government has declared that the trial of certain offences shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed a special list containing the names of such jurors as are borne on in the revised list ~~and~~ are, in the opinion of such Sessions Judge and Collector or other officers as aforesaid, by reason of their possessing superior qualification in respect of property, character and education fit persons to serve as special jurors: Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list

Preparation of list of special jurors.

to serve as an ordinary juror in cases not ~~triable~~ tried by "Special jury".

The names of the persons to be summoned shall be drawn by lot in open Court, excluding those on the revised list who have served within six months, unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

Act X of 1872, s. 407.

For form of precept to District Magistrate to summon jurors and assessors, see Sched. V, No. 32.

It is irregular to delegate the duty of selecting assessors to the Magistrate. His duty is purely ministerial. He has simply to issue a summons to each person specified in the precept of the Sessions Judge, requiring him to attend as an assessor at the time and place specified in the summons. The assessors are not to be selected several days before the trial, nor are they to be chosen by lot as are jurors; but they are to be chosen as the Judge thinks fit, as provided in s. 239 (284), at the commencement of the trial, from the persons summoned to act.—*Smyth*, p. 133.

Power to summon another set of jurors or assessors.

327. The Court of Session may direct jurors or assessors to be summoned at other periods than the periods specified in section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive, or whenever for other reasons such direction is found to be necessary.

Act X of 1872, s. 410.

Form and service of summons.

328. Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

Act X of 1872, s. 409, para. 1.

For form of summons to juror or assessor, see Sched. V, No. 33.

When Government or Railway servant may be excused.

329. Where any person summoned to serve as a juror or assessor is in the service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears, on the representation of the head of the office in which he is employed, that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

Act X of 1872, s. 411.

Certain servants of Railway Companies have been exempted by the Local Government. See note to s. 320, *supra*, p. 296.

Court may excuse attendance of juror or assessor.

330. The Court of Session may for reasonable cause excuse any juror or assessor from attendance at any particular session.

Act X of 1872, s. 412.

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331. At each session, the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.

List of jurors and assessors attending.

Such list shall be kept with the list of the jurors and assessors as revised under section 324.

A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

Act X of 1872, s. 413.

332. Any person summoned to attend as a juror or as an assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable, by order of the Court of Session, to a fine not exceeding one hundred rupees.

Penalty for non-attendance of juror or assessor.

Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

In default of recovery of the fine by such attachment and sale, such juror or assessor may by order of the Court of Session be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

Act X of 1872, s. 414.

No appeal lies from an order fixing an assessor or juror for non-attendance; see Chap. XXXI. But if a juror or assessor has been fined and subsequently gives good ground, such as illness, for his non-attendance, the Judge should reconsider his order.—*In re Gour Surun Dass*, 8 W. R., Cr., 83. See ss. 2?5 and 318, *supra*.

L.—*Special Provisions for High Courts.*

333. At any stage of any trial before a High Court under this Code before the return of the verdict, the Advocate General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

Power of Advocate General to stay prosecution.

The Count of Session may, if it shall think fit, at the conclusion of any trial direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months"

Count may relieve by special jury special jurors from liability to serve as jurors twelve months.

33. [illegible] an assessor [illegible] by a registered letter it was held that such [illegible] and not authorised by [illegible] the conviction based upon the [illegible] was illegal [illegible] now [illegible],

[illegible] CXVI

Act X of 1875, s. 146. It is to be noted that s. 146 of Act X of 1875, so far as it relates to informations, has not been repealed.—*Sched. I (b), post.* See pp. 175, 176, *supra.* The proviso in the last sentence, that, unless the presiding Judge otherwise directs, the discharge shall not amount to an acquittal, is new.

Time of holding sittings.

334. For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

Act X of 1875, s. 4.

Place of holding sittings.

335. The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the Governor General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Courts, may direct.

But it may from time to time, in the case of the High Court at Fort William, with the consent of the Governor General in Council, and in all other cases with the consent of the Local Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

Notice of sittings.

Such officer as the Chief Justice directs shall give notice beforehand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

Act X of 1875, s. 5.

Place of trial of European British subjects.

336. The High Court may direct that all European British subjects and persons liable to be tried by it under section 214, who have been committed for trial by it within certain specified districts or during certain specified periods of the year, shall be tried at the ordinary place of sitting of the Court,

or direct that they shall be tried at a particular place named.

Compare the first part of s. 27 of Act X of 1875.

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

Tender of pardon to accomplice.

Amd **337.** In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any Magistrate of the first class inquiring into the

Ch. XXIV s. 337 offence, or, with the sanction of the District Magistrate, any other Magistrate, may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof.

Every person accepting a tender under this section shall be examined as a witness in the case.

Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be.

Every Magistrate, other than a Presidency Magistrate, who tenders a pardon under this section, shall record his reasons for so doing; and when any Magistrate has made such tender and examined the person to whom it has been made, he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate.

Compare Act X of 1872, s. 347, and Act IV of 1877, s. 150.

If any Magistrate, not empowered by law, erroneously in good faith tenders a pardon under this section, his proceedings shall not be set aside merely on the ground of his not being so empowered.—*S. 529 (g), infra.*

The Court should, when it tenders a pardon to a prisoner, explain to him the conditions which accompany the tender. It is for the prisoner then to accept or refuse the tender. If he refuses, the tender will have been abortive and the trial will proceed as if no such tender had been made; if he accepts, it is the duty of the Court to examine him as a witness in the case, under the rules applicable to the examination of witnesses; and then if, after having so examined him, the Court be of opinion that he has not complied with the conditions, the Court may then commit or order him to be committed for trial upon the charge in respect of which pardon was tendered.—*Queen* v. *Gogalao*, 12 W. R, Cr., 80; (S. C.) 4 B. L. R., App., 50.

It is not competent to a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted, and therefore evidence given by such a person who had received a pardon in the case of an offence not exclusively triable by the Court of Session was held not to be relevant, that person not having been acquitted or discharged or convicted.—*Empress* v. *Sadhee Rasal*, I. L. R., 10 Calc., 936; *Reg.* v. *Hanmanta*, I. L. R., 1 Bom., 610; *Reg.* v. *Ashruff Sheikh*, 6 W. R., Cr., 91; *Empress* v. *Dala Jiva*, I. L. R., 10 Bom., 190. Statements made by an accused person in the course of such an examination are irrelevant, and if subsequently retracted could not be used against him or subject him to a prosecution for giving false evidence.—*Empress* v. *Dala Jiva*, I. L. R., 10 Bom., 190, and *The Empress* v. *Ashgar Ali*, I. L. R., 2 All., 260. See *Mohesh Chunder Kapali* v. *Mohesh Chunder Dass*, 10 C. L. R., 553.

As to the weight to be attached to the evidence of approvers, see note to s. 298, *ante*, p. 279. Section 114, ill. (*b*), of the Evidence Act provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.

See s. 439, *infra*.

PARDON, WITHDRAWAL OF—*Conditional Pardon to Prisoner—Power of Sessions Court to try person not committed—Approver, Evidence of—Criminal Procedure Code, ss. 162, 193, 337, 339, 374—Evidence Act. ss. 24, 30*] Two persons, *J* and *U*, were charged with the murder of *U's* husband, and in the course of the police enquiry made certain statements to the police. They were then set up by the police to a Deputy Magistrate for enquiry. *J* made three statements on the 28th of February, the 1st of March and the 9th of March 1894, respectively, two of which were confessions, the third being a withdrawal of such confessions. *U* also made two statements on the 2nd and 9th of March, the first of which was a confession, and the second a withdrawal thereof. On the 24th of April *U* was tendered a pardon, and was thereafter treated as an approver, in which capacity she gave evidence against *J*. *J* was then committed to the Court of Sessions to take his trial *U* being sent up as an approver. In the Sessions Court *U* resiled from her deposition before the committing Magistrate, and was then and there treated as an accused person, and placed on her trial with the other accused and the deposition aforesaid was put in as evidence. Both accused were convicted mainly on their confessions, *J* of murder and *U* of abetment of murder. *Held*, that the conviction of *U* was bad, the Court of Sessions having had no jurisdiction to try her as she was never committed to that Court by any competent Magistrate. *Held*, that the conviction of *J* was also bad—(1) Because *U's* statement to the police was not admissible in evidence. (2) Because her statements on the 2nd and 9th of March were not under the circumstances admissible in evidence, as she was not being legally tried jointly with him for the same offence. (3) That her deposition on the 24th of April was not admissible in evidence, because, apart from other reasons, *J* had no opportunity to cross-examine her. (4) Because *J's* confession under the circumstances was not a free and voluntary admission of guilt. *Held*, on the whole case that independently of the aforesaid statements and confessions, there was not sufficient evidence to justify the conviction. *Queen-Empress* v. *Rama Tevan*, I. L. R., 15 Mad., 352, commented on.

I. L. R. 22 Cal. p. 50

QUEEN-EMPRESS *v.* JAGAT CHANDRA MALI - - - -

Accomplices.—A conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law. But the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require.—*Elahee Baksh, Appellant,* 5 W. R., Cr., 80. See also *Queen* v. *Nawabjan,* 8 W. R., 19; *Queen* v. *Shumshere Beg,* 9 W. R., Cr., 51; *Queen* v. *Kali Churn Gangooly,* 7 W. R., Cr., 2; *Queen* v. *Mohima Chunder Dass,* 15 W. R., Cr., 37; Evidence Act, I of 1872, ss. 30, 114, ill. (*b*), and 133; *Reg.* v. *Ramasami Padayachi,* I. L. R., 1 Mad., 394; and *Reg.* v. *Budhu Nanku,* I. L. R., 1 Bom., 475. See s. 337, *infra.* A Judge may misdirect the jury as to what is corroboration of the testimony of an approver.—*Empress* v. *Bepin Biswas,* I. L. R., 10 Calc., 970. As to what is legal corroboration, see that case and *Reg.* v. *Mulapabin Kapana,* 11 Bom. H. C. R., 196; *Reg.* v. *Budhu Nanku,* I. L. R., 1 Bom., 475; *Reg.* v. *Jaffer Ali,* 19 W. R., Cr., 57; *Reg.* v. *Noqa,* 23 W. R., Cr., 24; and *Empress* v. *Imdad Khan,* I. L. R., 8 All., 120, p. 137.

In the case of *Queen* v. *Sadhu Mundul,* 21 W. R., Cr., 69, PHEAR, J., said:—"In the case of a trial by jury, it is the function of the jury to ascertain the facts upon the evidence before them, and for that purpose to be guided by the law which is applicable, and it is in all cases the duty of the Judge to point out to them that law. It was, therefore, in the present case, the duty of the Judge to lay before the jury substantially to the effect just set out, the principles relative to the reception of accomplices' testimony, which the Legislature sanctioned by the Indian Evidence Act; and we think the Judge was wrong in telling the jury that this case was one in which no caution or instruction from him was needed on this head. It is, in all cases where an accomplice's testimony is admitted, incumbent on the Judge to inform the jury of the results of the law bearing on this point substantially as we have endeavoured to explain it:" and section 114, ill. (*b*), of the Evidence Act provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.

The rule in that section coincides with the rule observed in England, that though the evidence of an accomplice should be carefully scanned and received with caution, and may be treated as unworthy of credit, yet if the jury or Court credits the evidence, a conviction proceeding upon it is not illegal. Section 133 of the Evidence Act in unmistakable term lays it down that a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice, and to hold that corroboration is necessary is to refuse to give effect to the section. —*Reg.* v. *Ramasami Padayachi,* I. L. R., 1 Mad., 394; and see *Reg.* v. *Budhu Nanku,* I. L. R., 1 Bom., 475.

In the case of *Joyudee Paramanick,* 7 C. L. R., 66, FIELD, J., expressed a grave doubt, whether the deposition of an approver taken before the committing Magistrate might be used as evidence against his accomplices on their trial before the Sessions Court, the conditional pardon of the approver having been withdrawn. A similar doubt was expressed by the Court (PRINSEP and TOTTENHAM, JJ.) in the case of *Nanha Malla* v. *Empress,* 13 C. L. R., 326. The Allahabad High Court, in the case of *Reg.* v. *Hardewar,* 5 All. H. C. R., 217, held that the evidence was not admissible.

Power to direct tender of pardon.

338. At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

See Act X of 1872, s. 348, omitting the words 'as a Court of Revision.' See also Act X of 1875, s. 77.

A Sessions Judge is not competent before a trial to instruct a Magistrate to tender a pardon under this section.—*In re Nistarinee Dabia,* 7 W. R., Cr., 114.

Ch. XXIV s. 339 A pardon may be tendered to a prisoner tried with others who has pleaded guilty (*Empress* v. *Kallu*, I. L. R., 7 All., 160), though not to a person who has pleaded guilty and been convicted on his plea.—*Ibid, per* DUTHOIT, J.

If any Magistrate, not empowered by law, erroneously in good faith tenders a pardon under this section, his proceedings shall not be set aside merely on the ground of his not being so empowered.—*S.* 529 (*g*), *infra.* See s. 439, *infra.*

Commitment of person to whom pardon has been tendered.

339. Where a pardon has been tendered under section 337 or section 338, and any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter.

The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been withdrawn under this section.

No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

See Act X of 1872, s. 349; Act X of 1875, s. 78; Act IV of 1877, s. 151. The person to whom the pardon has been tendered may now be tried, not only for the offence in respect of which the pardon was tendered, but for any other offence of which he appears to have been guilty in connection with the same matter. The last clause is new, and supersedes the decision in the case of *Queen* v. *Mullik Jeechoo*, 23 W. R., Cr., 12.

No limitation is fixed by this section, as by s. 349 of Act X of 1872, as to the time when a pardon may be withdrawn. See *Nobin Chunder Banikya* v. *Empress*, 10 C. L. R., 369; (S. C.) I. L. R., 5 Calc., 560.

When a prisoner to whom a tender of conditional pardon has been extended is considered by the Sessions Judge not to have conformed to the conditions under which pardon was tendered, the Sessions Judge, in exercising the power given by this section, ought not to try the prisoner along with the prisoners in whose case he has already given evidence.—*Queen* v. *Petumber Dhoobee*, 14 W. R., Cr., 10. He should wait until the conclusion of the trial of the accomplices, and then, before passing judgment on them, if found guilty, proceed against the approver.—*In re Joyudee Paramanick*, 7 C. L. R., 66.

In the case just mentioned, FIELD, J., expressed a grave doubt, whether the deposition of an approver taken before the committing Magistrate might be used as evidence against his accomplices on their trial before the Sessions Court, the conditional pardon of the approver having been withdrawn. A similar doubt was expressed by the Court (PRINSEP and TOTTENHAM, JJ.) in the case of *Nanha Malla* v. *Empress*, 13 C. L. R., 326. The Allahabad High Court, in the case of *Reg.* v. *Hardewar*, 5 All. H. C. R., 217, held that the evidence was not admissible. See s. 298, *supra.*

In the case of *Srinop* v. *Empress*, 12 C. L. R., 226, where a pardon was withdrawn by the Sessions Judge before the hearing of the whole of the evidence, without proof that the statement made by the person pardoned was inconsistent, except on the most immaterial points, with previous statements made by him or contradicted by the evidence, and before any evidence affecting his veracity had been given, it was held that the pardon had been improperly withdrawn.

339. Section 339 is not very clear in its wording but it says that such person "may be tried for the offence in respect of which the pardon was so tendered" and that rather points to the trial of such person not being merely a continuation of the trial at which he gave the false evidence, but a trial so far as he is concerned *de novo*.
Queen Empress vs. Nudin [illegible] 14 All 502

340. Meaning of "accused" – The word "accused" means a person over whom the Magistrate or other court is exercising jurisdiction.

Under the provisions of § 340 Crim. P. Code a Sessions Judge is bound to hear the pleader appointed by a person who though not accused of any offence is ordered to give security for good behaviour under §118 of the Crim. P. Code.

Queen Empress v. Mona Puna I. L. R. 16 Bom. 661 [illegible]
Jhoja Singh v. Queen Empress
I. L. R. 23 Cal. 493.

The want of sanction required by this section is not a mere irregularity curable under s. 537, but is a fatal defect.—*Sharina* v. *Empress*, Panjab Rec., 1884, p. 92. Ch. XXIV s. 340

A deposition given by a person to whom a conditional pardon had been tendered is not, after withdrawal of the pardon, admissible against him in a subsequent proceeding, or in the trial of himself with his accomplices, unless it is first proved that he was the person who was examined and gave the deposition.—*Empress* v. *Durga Sonar*, I. L. R., 11 Calc., 580.

Where a pardon is legally tendered to an accused, and he then makes a statement on oath, which he retracts on a subsequent judicial proceeding, a proper sanction under s. 195, *supra*, for a prosecution for giving false evidence would be necessary.—*Empress* v. *Dala Jiva*, I. L. R., 10 Bom., 190; *In re Balajee* v. *Sitaram*, 11 Bom. H. C. R., 34. If the charge of giving false evidence were in respect of the deposition made under the conditional pardon, the sanction of the High Court would be also necessary.

Right of accused to be defended.

340. Every person accused before any Criminal Court may of right be defended by a pleader.

Act X of 1872, s. 186, paras. 1 and 2, as amended by Act XI of 1874, s. 13; Act X of 1875, s. 31; Act IV of 1877, s. 130.

'Pleader,' used with reference to any proceeding in any Court, means a pleader authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil, and an attorney of a High Court so authorized, and (2) any mukhtar or other person appointed with the permission of the Court to act in such proceeding.—*S.* 4 (*n*). See the Legal Practitioners' Act.

Under s. 440, no party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision: Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect s. 439, para. 2. (Compare Act X of 1872, s. 297, last paragraph.) Under that section no order can be made to the prejudice of the accused, unless he has had an opportunity of being heard either personally or by pleader in his own defence. See *Reg.* v. *Devama*, I. L. R., 1 Bom., 64.

Sections 492—495 provide for the employment of prosecutors.

Schedule II, art. 10, of the Court Fees Act (VII of 1870) provides that the fee upon a mukhtarnamah, when presented for the conduct of any one case to any Criminal Court other than a High Court, shall be annas eight.

Magistrates should not, by the indiscriminate exclusion of persons who are invested by law with a distinct professional status in criminal trials, deprive parties of legal aid which they can frequently obtain at a moderate cost.—*Cal. H. C. C.O.*, *No.* 13, *29th August* 1870, *Wilkins*, p. 116.

The following rulings of the Madras High Court are important in that Presidency:—

Advocates, vakils, and attorneys-at-law of the High Court are entitled to practise in all Criminal Courts subject to the control of the High Court (*Mad. H. C. Pro.*, 31*st October* 1863, *Weir*, p. 25). Vakils of a Sessions Court are entitled to practise in all Courts subordinate to the Sessions Court (*Mad. H. C. Pro.*, 23*rd November* 1865, *Weir*, p. 25). No advocate or attorney or authorized pleader appearing in defence of an accused person is required to file a vakalutnamah.—*Mad. H. C. Pro.*, 23*rd November* 1874, *Weir*, p. 25. A pleader of a District Munsif's Court comes within the category of 'authorized pleaders,' and as such is not required to file a vakalutnamah.—*Mad. H. C. Pro.*, 28*th March* 1879, *Weir*, p. 25.

The High Court being precluded from hearing any other person than an advocate or vakil of the Court on behalf of a suitor not appearing in person, Judicial Officers in the provinces should refuse to authenticate a mukhtarnamah or other power given by a convicted person to a private agent for the purpose of appealing to the High Court.—*Mad. H. C. Pro.*, 13*th September* 1862, *Weir*, p. 25; but see *Mad. H. C. Pro.*, 27*th September* 1877, *Weir*, p. 3.

Ch. XXIV s. 341

A general order excluding any particular class from appearing as pleaders is illegal.—*Mad. H. C. Pro*, *14th January* 1875, *Weir*, p. 26.

Advocates pleading in any lower Court in which the language of the Judge is English may address the Court in that language, the Judge making arrangements for the interpretation, if necessary, of such address to the pleader on the other side.—*Mad. H. C. Pro.*, *22nd July* 1858, *Weir*, p. 26.

In Bengal, with the permission of the presiding Judge or Magistrate, any advocate or pleader may address the Court in English, when any one of the pleaders on the opposite side is acquainted with that language, or whenever the senior of such pleaders or his client consents to this being done.—*Calc. H. C. C. O.*, *No.* 4 *of 15th March* 1869, *Wilkins*, p. 4.

In Bombay, it was held that an appellant has a right to appear and be heard by a mukhtar.—*Empress* v. *Shivram Gundo*, I. L. R., 6 Bom., 15; see *In re Subbap Aitala*, I. L. R., 1 Mad., 304.

341. If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Procedure where accused does not understand proceedings.

Act X of 1872, s. 186, para. 3; Act X of 1875, s. 130; Act IV of 1877, s. 131.

The provisions of this section do not apply to a person who is of unsound mind. They apply to persons who are unable to understand the proceedings from deafness or dumbness, or ignorance of the country or other similar cause. Where the inability to understand proceedings is due to unsoundness of mind, the procedure in Chap. XXXIV should be followed.—*Empress* v. *Husen*, I. L. R., 5 Bom., 262.

In the case of *The Queen* v. *Bowku Hari*, 22 W. R., Cr., 35, the prisoner was deaf and dumb, and unable to understand the proceedings against him or to plead to the charge. The Sessions Judge convicted the prisoner, and forwarded the proceedings to the High Court. PHEAR, J., said, after quoting the provisions of s. 186 of Act X of 1872: "The discretion thus vested in this Court is very wide indeed. And it would seem to be a right inference from the section, that although the prisoner had not been able to understand the proceedings, and therefore those proceedings had not, according to the principles of the English common law, constituted a fair and proper trial, yet, under special circumstances, if this Court should think fit, it might treat them as amounting to a sufficient trial, and pass sentence upon the prisoner according to the facts which seemed to be established in the course of, and as the result of, those proceedings." The case was remanded in order that the prisoner might have a further opportunity of defending himself, and he was ultimately convicted; see the same case reported in a later stage, 22 W. R., Cr., 72. In the case of *Dwarka Nath Haldar* v. *Noder Chand Kamte*, 22 W. R., Cr., 35, which was followed in *Atu Ram* v. *Empress*, Panjab Rec, 1885, p. 78, a prisoner, who had been deaf and dumb from his infancy, was charged with criminal misappropriation of property. The impression produced upon the mind of the Court by the evidence was, "that the prisoner is silly, and was probably attracted by the bright ornament which, with a sort of magpie instinct, he stole and hid," and the prisoner was admonished and discharged.

When a deaf or dumb person is placed on his trial, some means of communicating with him should be adopted (*Mad. H. C. Pro.*, *24th May* 1870, *Weir*, p. 42); and proceedings taken in conducting the trial without making any attempt to communicate with the accused are clearly wrong.—*Mad. H. C. Pro.*, *5th December* 1870, *Weir*, p. 42. No sentence can be passed under this section if the Magistrate is uncertain whether the accused has understood the proceedings against him.—*Mad. H. C. Pro.*, *18th November* 1875, *Weir*, p. 42.

342. Questions put by the Court to an accused person under the provisions of sec 342 must be strictly limited to the purpose described in that section i.e. "of enabling the accused to explain any circumstances appearing in the evidence against him". The evidence refer[illegible] that section is the evidence already given [illegible] trial at the time when the Court puts [illegible] to the accused.

Queen Empress v.s. Hargobind Singh.
I.L.R 14 All 242

[illegible] statement [illegible] in support [illegible] an [illegible] which he was [illegible]

[illegible] 47 [illegible]

In the matter [illegible]

When a Deputy Magistrate, who tried and convicted a prisoner, considered that he did not understand the proceedings and referred the case to the Magistrate, who considered that the accused did understand what he was charged with, it was held that the finding of the Magistrate must prevail.—*In re Doobri Hulwai*, 19 W. R., Cr., 37.

Before reporting the circumstances of the case to the High Court, this section requires the Court to proceed to the end of the inquiry or trial.—*Mad. H. C. Pro.*, *22nd April* 1873, *Weir*, p. 42.

342. For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

Power to examine the accused.

The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answer as it thinks just.

The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

No oath shall be administered to the accused.

As to para. (1), see Act X of 1872, s. 193 (para. 1), and ss. 250 and 342. See also Act X of 1875, s. 61, and Act IV of 1877, ss. 5, 148.

As to para. (2), see Act X of 1872, s. 193 (para. 2), and s. 343; compare also Evidence Act, I of 1872, s. 114, illus. (*h*).

As to para. (3), see Act X of 1872, s. 193, explanation; and as to para. (4), Act X of 1872, s. 345.

As to reading the examination of the accused before the Magistrate at the Sessions trial, see s. 287, *ante*, p. 268.

Examination of accused.—See note to s. 254, *supra*.

It is not competent to the Court under this section to subject the accused to cross-examination.—*Hurry Churn Chuckerbutty* v. *Empress*, 13 C. L. R., 358; (S.C.) I. L. R., 10 Calc., 140. The discretion given by the law is not to be used for the purpose of driving the accused to make statements criminating himself; but only for the purpose of ascertaining from the accused how he is able to meet facts standing in evidence against him, so that those facts should not stand against him unexplained.—*In re Chinibash Ghose*, 1 C. L. R., 436; *Virabudra Gaud*, 1 Mad. H. C. R., 199; *Queen* v. *Bholanath Sein*, 25 W. R., 57; *Queen* v. *Sheik Bazu*, 8 W. R. (F. B.), 47; *Empress* v. *Behari Lall Bose*, 6 C. L. R., 431; *In re Noor Bux Kazi*, I. L. R., 6 Calc., 279; (S. C.) 7 C. L. R., 385; *Pro.*, 1 Mad. H. C. R., 199, *Weir*, p. 42. In the recent case of *In re Hossein Buksh Sheikh*, I. L. R., 6 Calc., 96; (S. C.) 6 C. L. R., 527, Prinsep, J., said: "In permitting a Sessions Judge to examine an accused person from time to time during a trial, the law does not contemplate that he should commence a trial with a strict examination of a prisoner, in the manner of the cross-examination of an adverse witness by counsel. . . . By exercising the power allowed by s. 250 (342), the Sessions Court is not to establish a Court of Inquisition, and to

Ch. XXIV s. 342 force a prisoner to convict himself by making some criminating admissions after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge to ascertain from time to time, from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by the witness, or, after the close of the case, how he can meet what the Judge may consider to be damnatory evidence against him. In one of these cases now before us, we observe that the Judge was engaged, during the whole of the first day, in examining the accused. In like manner, in the second case, he examined the accused at considerable length before the case for the prosecution was opened. Such proceedings appear to us to be an abuse of the power given under the law."

In the case of *Empress* v. *Yakub Khan*, I. L. R., 5 All., 253, the Court (STUART, C. J., and STRAIGHT, J.) said, p. 256: "We think it well to point out, on reference to ss. 342 and 364 of the Code, that while it is not intended to empower Magistrates to cross-examine persons charged before them, they are, nevertheless, authorized to put any questions which appear necessary at any stage of an inquiry or trial, and particularly when all the witnesses for the prosecution have been examined, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. Such questions, with the answers, should be recorded in full, and, when completed, should be read over to the accused, who is to be permitted to explain or add to his answers, and such explanations or additions must be taken down. After this has been done, the examination must be signed at the foot by the accused and by the Magistrate, who should further certify that it was read over to the accused and signed by him after being taken in the presence and hearing of him (the Magistrate), and it is a full and true account of the statement made by the accused."

A confession recorded by a Magistrate having jurisdiction is to be treated as an examination under this section, notwithstanding that the prisoner or prisoners may have been brought before the Magistrate before the conclusion of the police investigation.—*Empress* v. *Anuntram Singh*, I. L. R., 5 Calc., 957, followed in the case of *Empress* v. *Yakub Khan*, I. L. R., 5 All., 253.

The Court should not put questions to the prisoner during the trial with a view to supplement the evidence for the prosecution.—*Reg.* v. *Diaz*, 3 Bom. Cr. Cas., 51. It is a matter of discretion for the Magistrate himself to judge whether, during the inquiry before him, it is right and proper that the accused should be examined or not, and it is very undesirable that the accused should be examined, when the Magistrate is satisfied that the evidence adduced by the prosecution does not disclose any proper subject of criminal charge against him.—*In re Shuma Sankar Biswas*, 1 B. L. R., S. N., xvi.

Section 114 of the Evidence Act (I of 1872) provides: "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in relation to the facts of the particular case." Illustration (*h*) is as follows: "The Court may presume that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences, none of which were exclusively triable by the Court of Session, and such person was examined as a witness in the case, it was held that, as the tender of pardon was not warranted, he could not be legally examined on oath, and his evidence was inadmissible.—*Empress* v. *Asghar Ali*, I. L. R., 2 All., 260; and see *Reg.* v. *Hanmanta*, I. L. R., 1 Bom., 610.

The statements made by an accused person at his trial are to be taken down *in extenso* precisely as made; and, if practicable, in the language in which they are made.—*Mad. H. C. Pro.*, 13*th May* 1867, *Weir*, p. 43.

As to examining one of two accused persons in the absence of his fellow-prisoner, see *Empress* v. *Lakshman Bala*, I. L. R., 6 Bom., 124; *Empress* v. *Chundra Nath Sirkar*, I. L. R., 7 Calc., 65; (S. C.) 8 C. L. R., 352; and *In re Chakowrie Lall*, 13 C. L. R., 275; see also note to s. 239, *supra*.

343. Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

No influence to be used to induce disclosures.

Ch. XXIV secs. 343-344

Act X of 1872, s. 344; Act IV of 1877, s. 149.

In reading this section, the provisions of the Evidence Act, I of 1872, ss. 24—29, should be borne in mind.

Section 24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Section 25. No confession made to a Police-officer shall be proved as against a person accused of any offence.

Section 26. No confession made by any person whilst he is in the custody of a Police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Section 27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Section 28. If such a confession as is referred to in section twenty-four is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the Court, been fully removed, it is relevant.

Section 29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

See the notes on these sections of the Evidence Act under s. 163, *supra*.

Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences, none of which was exclusively triable by the Court of Session, and such person was examined as a witness in the case, it was held, that the tender of pardon to such person not having been warranted by s. 347 of Act X, 1872, he could not legally be examined on oath, and his evidence was inadmissible. It was also held, that his statement was irrelevant and inadmissible as a confession with reference to s. 344 of Act X of 1872 and s. 24 of the Evidence Act.—*Empress* v. *Asghar Ali*, I. L. R., 2 All., 260. See *Reg*. v. *Hanmanta*, I. L. R., 1 Bom., 610; *Empress* v. *Sadhee Rasal*, I. L. R., 10 Calc., 936; *Empress* v. *Dala Jiva*, I. L. R., 10 Bom., 190.

344. If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, by order in writing, stating the reasons therefor, from time to time postpone or adjourn the same on such terms as it thinks fit, for such time as it con-

Power to postpone or adjourn proceedings.

Remand.

Ch. XXIV s. 344 siders reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Reasonable cause for remand.

EXPLANATION.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Act X of 1872, s. 194, para. 1, and explanation; see also s. 208, para. 1, and ss. 219 and 264; Act X of 1875, s. 66; Act IV of 1877, ss. 86, 124; and see 11 and 12 Vict., c. 42, s. 21.

This section authorizes a Magistrate, for reasonable cause, to remand an accused person to jail without examining any witnesses. See *Manikam* v. *Queen*, I. L. R., 6 Mad., 63. In that case it was held, although evidence was available, that the Magistrate was justified, for reasons recorded by him, without taking sworn testimony, to remand the prisoner for 5 days and again for 4 days in order that further evidence might be produced, so that the inquiry when commenced might be continuous. See *Mohesh Chunder Banerjee*, 4 B. L. R., Appx., 1. In that case there was no evidence. and the prisoners were remanded only in the expectation that evidence might turn up.

In the case of *Ponnusami Chetti* v. *Queen*, I. L. R., 6 Mad., 69, it was held by TURNER, C. J., and KERNAN, J., that where an accused person is first brought before a Magistrate, and a remand is required by the prosecutor, it is ordinarily sufficient to show by the evidence of a Police-officer that the police are in possession of information believed to be reliable that the accused has committed an offence; but when the accused is again brought up after remand, and a further remand is needed, some direct evidence of the guilt of the prisoner should be required to justify the Magistrate in refusing bail, and with each remand the necessity of production of evidence of guilt becomes stronger. An accused has the right to have the evidence against him recorded at as early a period as possible, and the fact that there is or may be a great body of evidence forthcoming against him is not a ground for detention for an inordinate period.—*Manikam* v. *Queen*, I. L. R., 6 Mad., 63. Where a Magistrate defers the examination of witnesses, adjourns the inquiry, and remands the prisoner, he is bound to express clearly on the record the reasonable cause for which such action became necessary or advisable. — *Per* KERNAN, J., *Manikam* v. *Queen*, I. L. R., 6 Mad., 63, pp. 67-68.

So, in another case it was laid down, that when a prisoner is once arrested under a warrant, he should be brought up promptly before the Magistrate; and the Magistrate has then no authority to further detain him in custody, or to remand him to prison, without some reason made manifest to him either in the shape of sworn testimony given before him, or in some other form which can be put upon the record, and which is sufficient to justify him in sending the prisoner to prison, there to be detained for a limited period before further examination—a period which is never in any case to exceed fifteen days.—*In re Abdool Kadir*, 11 B. L. R., Appx., 11.

See *Empress* v. *Sagambar*, 12 C. L. R., 720.

In every case in which a commission is issued under s. 503 or s. 506, the inquiry, trial, or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.—*S.* 508, *post.*

Where a Magistrate had adjourned an inquiry for a cause not contemplated by s. 224 of Act XXV of 1861, the High Court, in exercising the powers of superintendence conferred by s. 15 of 24 and 25 Vict., c. 104, set aside the order of remand.—*In re Mathuranath Chuckerbutty*, 9 B. L. R., 354. In that case, COUCH, C. J., said:—"We have to consider what is the power conferred upon the Magistrate by s. 224. It is said that if, from the absence of a witness, or from any other reasonable cause, it shall become necessary or advisable to defer the examination of witnesses, it shall be lawful for the Magistrate to adjourn the inquiry. It appears to me, looking at the language of this section, that, if there is not a proper cause—a cause such as is described—a Magistrate has not power to adjourn the inquiry, and it is not lawful for him to do it. A Magistrate is not at liberty, arbitrarily, or for any reason which he may think sufficient, to adjourn the inquiry; it is only to be in the cases mentioned. And although an improper adjournment of the inquiry by a Magistrate—an adjournment on a ground which could not be said to show that it was either necessary or advisable—might scarcely be said to be an error in the decision upon a point of law, or to involve any question of law, and s. 404 of the Code of Criminal Procedure (Act XXV of 1861) might possibly not enable this Court to interfere, we have, by the 15th section of the Act under which this Court is established, a power of superintendence which enables us to deal with such a case. I think it enables us, where a Magistrate had adjourned an inquiry where it was not lawful for him to do so under s. 224, to set aside the order. It seems to me desirable that Magistrates should understand that the power conferred by s. 224 is a power which is only to be exercised in cases which come really within the terms of that section. It is not a power conferred upon them to be exercised in an arbitrary manner, and not according to rule, but a power which they ought to be careful in exercising."

Where the accused has not his witnesses in attendance and does not apply to the Magistrate to summon them, the omission of the Magistrate to require him to produce his witnesses does not prejudice the accused or amount to an error or defect calling for interference.—*Queen* v. *Totaram*, 11 W. R., Cr., 15.

It is not an irregularity to adjourn the trial for the purpose of allowing the accused to secure the attendance of his witnesses.—*In re Dinoo Roy*, 16 W. R., Cr., 21.

In Madras, copies of all orders of remand, together with the reasons for such orders, must be transmitted by the Subordinate Magistrate to the Divisional or District Magistrate, to whom he is immediately subordinate, within twenty-four hours from the date of the same.—*Mad. H. C. Rule, embodied in M. G. O., 6th May* 1878, *No.* 944, *Mad. H. C. L., 7th April* 1879, *No.* 624, and *Mad. H. C. Pro., 8th Sept.* 1879, *Weir*, p. 34.

Bail.—If the offence is bailable, and the accused is prepared to furnish such bail as appears to the Court reasonable, s. 496, *post*, directs that he *shall* be released on bail.

Section 497 provides for the case of non-bailable offences as follows:—"When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a Police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused. If it appears to such officer or Court at any stage of the investigation, inquiry, or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed such offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided. Any Court may, at any subsequent stage of any proceeding under this Code, cause any person who has been released under this section to be arrested, and may commit him to custody."

Under s. 548, *post*, a Court may, at any stage of any inquiry, trial, or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

See notes to s. 252, *supra*.

Ch. XXIV
s. 345

Remand to custody of Police.—"There is no express provision in the Code regarding the remand of an accused person to police custody after he has been sent before the Magistrate. Such a course is only warranted under the same circumstances as would warrant the Magistrate's ordering the detention of the accused person by the police for more than twenty-four hours under s. 124 of Act X of 1872. There is a great distinction between such a remand and an ordinary remand to the Magistrate's lock-up on the adjournment of an inquiry, owing to the absence of a witness or from any other reasonable cause. The non-completion of the inquiry justifies the latter, but the former requires something more, as it is expressly provided by s. 124 that the non-completion of the inquiry shall not, in the absence of a special order of a Magistrate, be deemed to be a sufficient cause for the detention of an accused person by the police. A remand to police custody ought only to be granted in cases of real necessity, and when there is good reason to believe that the accused can point out property or do anything that will assist in elucidating the case."—*Smyth*, p. 87.

Section 61 provides that no Police-officer shall detain in custody a person arrested without warrant for a longer period than, under all the circumstances of the case, is reasonable, and such period shall not, in the absence of a special order of a Magistrate under s. 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Section 167 is as follows:—"Whenever it appears that any investigation under this chapter cannot be completed within the period of twenty-four hours fixed by s. 61, and there are grounds for believing that the accusation is well-founded, the officer in charge of the Police-station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having jurisdiction. A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing. If such order be given by a Magistrate other than the District Magistrate, he shall forward a copy of this order with his reasons for making it to the Magistrate to whom he is immediately subordinate."

A remand cannot be granted in the absence of the prisoner. The meaning of a remand is, that a prisoner is brought up and re-committed to custody.—*Mad. H. C. Pro.*, 10*th June* 1867, *Weir*, p. 34.

As to remanding accused persons, see further s. 208, *supra*, and the notes thereto.

345. The offences punishable under the sections of the Indian Penal Code, described in the first two columns of the table next following, may be compounded by the persons mentioned in the third column of that table:—

Compounding offences.

Offence.	Sections of Indian Penal Code applicable.	Person by whom offence may be compounded.
Uttering words, &c., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt	323, 334	The person to whom the hurt is caused.

Requisites for composition of offence valid in law. Onus — Where an accused person alleges that an offence with which he is charged has been compounded so as to take away the jurisdiction of the Criminal courts to try it, the onus is on him to show that there was a composition valid in law. Murray v. The Queen Empress. I.L.R. 21 Cal. 103

Offence.	Sections of Indian Penal Code applicable.	Person by whom offence may be compounded.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force ...	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour ...	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.
Criminal trespass	447	The person in possession of the property trespassed upon.
House-trespass	448	
Criminal breach of contract of service.	490, 491, 492	The person with whom the offender has contracted.
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with a criminal intent a married woman.	498	
Defamation	500	The person defamed.
Printing or engraving matter knowing it to be defamatory.	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.

The offence of voluntarily causing hurt, voluntarily causing grievous hurt, causing hurt by an act which endangers life, or causing grievous hurt by an act which endangers life, punishable under section 324, section 335, section 337, or section 338 of the Indian Penal Code, may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

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When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

When the person who would otherwise be competent to compound an offence under this section is a minor, an idiot or a lunatic, any person competent to contract on his behalf may compound such offence.

The composition of an offence under this section shall have the effect of an acquittal of the accused.

No offence not mentioned in this section shall be compounded.

See Act X of 1875, s. 151, and Act IV of 1877, s. 133.

Act X of 1872, s. 188, provided that, in the cases which might lawfully be compounded, injured persons might compound the offence out of Court, or in Court with the permission of the Court; and that such withdrawal from the prosecution should have the effect of an acquittal of the accused person.

Considerable doubt existed formerly as to what offences might be compounded. See the cases collected in *Reg.* v. *Rahimat,* I. L. R., 1 Bom., 147. It is now clear that only the offences mentioned in this section may be compounded.

As to withdrawal of complaint, see s. 248, *ante,* p. 236, and as to discharging an accused person, when upon the day fixed for the hearing the complainant is absent, and the offence may be lawfully compounded, see s. 259, *ante,* p. 248. Act VIII of 1882, s. 6, provides that in s. 214 of the Indian Penal Code, for the exception, the following shall be substituted, namely:—

"*Exception.*—The provisions of ss. 213 and 214 do not extend to any case in which the offence may lawfully be compounded." See the provisions of these sections.

The fact that an offence alleged to have been committed has been compounded is no conclusive answer to a charge made against the prosecutor under s. 211 of the Penal Code.—*Empress* v. *Atar Ali,* I. L. R., 11 Calc., 79. In the case of *Himmat Singh* v. *Bukhtawar,* Panjab Rec., 1883, p. 57, it was held, that the withdrawal of a complaint on the composition of an offence under this section did not preclude the Magistrate from awarding compensation under s. 250, *supra,* if in his opinion the complaint was frivolous or vexatious.

Procedure of Provincial Magistrate in cases which he cannot dispose of.

346. If, in the course of an inquiry or a trial before a Magistrate in any district outside the Presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate, or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

See Act X of 1872, s. 46, paras. 1 and 2. That section directed the Magistrate to stay proceedings, etc., when the evidence warranted a presumption that the accused person had been guilty of an offence which such Magistrate was not competent to try. The Magistrate now is to act under this section, when the presumption is that the case is one which should be tried or committed for trial by some other Magistrate. Ch. XXIV s. 347

As to subordination of Magistrates, see s. 17, *ante*, p. 15.

Where a case, which has been partly heard by one officer, is transferred to another officer for trial, the latter should hear all the evidence in the case before deciding it. In one case the High Court declined to interfere, as the prisoners did not appeal or raise any objection at the trial on that ground.—*Kopil Nath Sahi* v. *Koneeram*, 14 W. R., Cr., 3. See *Reg.* v. *Adapa Venkanna*, I. L. R., 4 Mad., 327. The Magistrate hearing the case is bound to pass an independent judgment upon the facts as they may appear to him from the record, and must not take them as found by the lower Court. If the materials for a judgment appear to be insufficient, he may call up and examine the witnesses, and, if necessary, take further evidence.—*Mad. H. C. Pro., 20th May* 1867, *Weir*, p. 44. See s. 350, *post.*

Where a Subordinate Magistrate, having found certain persons guilty of an offence, submitted the proceedings to a superior Magistrate for more severe punishment, and those proceedings were returned to him as defective, it was held by the Madras High Court, that he was competent to record a fresh and different finding as to the guilt of the accused upon the further proceedings held by him in the case.—*Mad. H. C. Pro., 15th July* 1878, *Weir*, p. 44.

A reference under this section to a District or Divisional Magistrate should be by a brief report explaining the nature of the case. All the proceedings held by the Subordinate Magistrate should be submitted for the information of his superior, who will nevertheless proceed altogether *de novo*. See *Mad. H. C. Pro., 22nd Dec.* 1864 *and 22nd May* 1865, *Weir*, p. 32. See *Queen* v. *Adapa Venkanna*, I. L. R., 4 Mad., 327.

It was held in Madras, that a Divisional Magistrate could not refer to another Magistrate a case referred to him by a Subordinate Magistrate, but must deal with it himself.—*Mad. H. C. Pro., 8th and 10th Nov.* 1870, *Weir*, p. 32.

Magistrates are not at liberty to pass over material parts of the evidence in cases before them, and so to withdraw cases from the cognizance of the proper tribunals.—*Queen* v. *Ramtahal Sing*, 5 W. R., Cr., 65. See *In re Chunder Seekur Sookul*, I. L. R., 1 Calc., 414.

No Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction over the minor charges (*In re Chunder Seekur Sookul*, I. L. R., 1 Calc., 434; *Ramanand Mahton* v. *Koylash Mahton*, I. L. R., 11 Calc., 236; *Empress* v. *Abdool Karim*, I. L. R., 4 Calc., 18; (S. C.) *In re Abdool Kadir*, 3 C. L. R., 44); such proceedings are void under s. 530, *infra*. If a charge of an offence not triable summarily is laid and sworn to, the Magistrate must proceed with the case accordingly, unless he is at the outset in a position to shew from the deposition of the complainant that the circumstances of aggravation are really merely exaggeration and not to be believed.—*Ib.*

If a Magistrate, not being empowered in that behalf, tries an offender summarily, his proceedings are void,—*S.* 530, *post.*

An officer, it was held, invested with special powers under s. 34, *supra*, should rarely, if ever, try a case himself where it appears from some of the evidence that the accused might have been charged with an offence beyond his jurisdiction to take cognizance of.—*Empress* v. *Paramananda*, I. L. R., 10 Calc., 85.

Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.

347. If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall stop further proceed-

Ch. XXIV s. 348 ings, and commit the accused under the provisions hereinbefore contained.

If such Magistrate is not empowered to commit for trial, he shall proceed under section 346.

Act X of 1872, s. 46 (para. 3), ss. 221 and 436 (para. 3); Act IV of 1877, s. 127.

Magistrates are not at liberty to pass over material parts of the evidence in cases before them, and so to withdraw cases from the cognizance of the proper tribunals.—*Queen* v. *Ramtahal Sing*, 5 W. R., Cr., 65. See *Puran Telee* v. *Bhuttoo Dome*, 9 W. R., Cr., 5.

A Magistrate may stop further proceedings and commit for tral after a charge has been drawn up.—*Empress* v. *Kudrutoollah*, I. L. R., 3 Calc., 495.

A Magistrate to whom a case is referred for enhancement of punishment (see s. 348) may order the committal of the case for trial by the Sessions Court.—*In re Chinnimarigadu*, I. L. R., 1 Mad., 289.

The following instructions as to cases where death has ensued, and it is doubtful whether the offence of culpable homicide has been committed, have been issued by the Calcutta High Court:—In cases where death appears to have resulted from injuries voluntarily inflicted by the party accused, Magistrates ought to be very careful not to take it upon themselves to absolve the accused from the graver charge and convict them of hurt or grievous hurt only, unless they are quite clear that there is no sufficient evidence to warrant a commitment to the Sessions for murder or culpable homicide not amounting to murder.—*Calc. H. C. C. O., No. 9, 6th Sept.* 1869, *Wilkins*, p. 112.

See note to s. 209, *supra*.

Except as provided by s. 395, which relates only to a sentence of whipping, which cannot be carried out owing to the state of health of the prisoner, it was held, that no Criminal Court, whether a High Court (*Queen* v. *Mehtarji Gopalji*, 7 Bom. H. C. R., Cr. Cas., 67; *Queen* v. *Godai Raout*, 5 W. R., Cr., 61; (S. C.) 1 Wym. Cr. Rul. (F.B.), 63; *In re Krishno Churn*, 17 W. R., Cr., 2), a Sessions Court (*Queen* v. *Poran Mal*, 23 W. R., Cr., 49), or a Magistrate (*Reg.* v. *Tukia Valad Gunji*, 1 Bom. H. C. R., 3), has power to review or alter a sentence when it has been formally recorded; and a lower Court has no power to quash its own conviction though illegal.—*In re Gunowree Bhooea*, 6 W. R., Cr., 70. Now s. 369 expressly provides that no Court other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in s. 395, or to correct a clerical error.

A judgment or final order pronounced and signed in accordance with this section cannot be altered or reviewed by the Court which has given such judgment or order. If the Judge, after pronouncing and signing the judgment or order, should discover any error in the proceedings, the proper course is to apply to the High Court for orders.—*Mad. H. C. Pro., 13th Nov.* 1873, *Weir*, p. 17.

Where a Sessions Judge added a note to his judgment, throwing doubts on the conclusion at which he had arrived on the evidence, STUART, C. J., described the proceeding as most unwarrantable.—*Empress* v. *Chattar Singh*, I. L. R., 2 All., 33.

As to the mode of delivering judgment and contents and language of judgment, see ss. 366 and 367, *post*.

Trial of persons previously convicted of offences against coinage, stamp-law or property.

348. Whoever having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards,

349. An Honorary Magistrate exercising 3rd class powers tried an accused on a charge of criminal trespass and convicted and sentenced him to pay a fine of 10 Rs or in default to suffer seven days rigorous imprisonment. He further submitted the case to the Dt. Magistrate with a recommendation that the accused should be bound down to keep the peace under §106 Cr. P. Code, and the Dt magistrate ordered the accused to furnish security.
Held that the order of the Dt. magistrate was illegal and must be set aside.
Before an order under §106 can be properly passed the conviction must be by a Magistrate of the class mentioned in the section and not by a 3rd class magistrate and the order must be passed by the magistrate who convicts and passes the sentence.
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shall ordinarily, if the Magistrate before whom he is accused considers him an habitual offender, be committed to the Court of Session or High Court, as the case may be; or, in districts in which the District Magistrate has been invested with powers under section 30, placed on his trial before such Magistrate.

Act X of 1872, s. 315; Act IV of 1877, s. 128.

If it is intended to prove a previous conviction against an accused person for the purpose of enhancing the punishment, it is necessary to state the fact of that previous conviction in the charge. If it is omitted, it may be added to the charge at any time previous to the sentence being passed, but not after.—*Queen* v. *Rajcoomar Bose*, 19 W. R., Cr., 41; and see *Queen* v. *Essan Chunder Dey*, 21 W. R., Cr., 40. A statement in a Court that at the time when the prisoner committed the offence he had been previously convicted of offences punishable under the Indian Penal Code, is not a sufficient compliance with the provisions of this paragraph.—*Queen* v. *Sheik Jakir*, 22 W. R., Cr., 39.

As to previous conviction, see further notes to ss. 221 and 310, *ante*, pp. 211, and 292, and to s. 511, *post*.

Chapter XII of the Indian Penal Code relates to offences relating to coin and Government stamps, and Chap. XVII to offences against property.

Procedure when Magistrate cannot pass sentence sufficiently severe.

349. Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion after hearing the evidence for the prosecution and the accused that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Subdivisional Magistrate to whom he is subordinate.

The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence; and shall pass such judgment, sentence, or order in the case as he thinks fit, and as is according to law: Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.

Act X of 1872, s. 46, paras. 1 and 2, inserting the words "different in kind from, or" after 'punishment.' The provision as to requiring the accused to execute a bond is new.

It is not competent for a Magistrate, to whom a case has been referred, to return the case to the referring Magistrate, on the ground that, in his opinion, the latter has power to pass an adequate sentence.—*Dula Faqueer* v. *Bhagirut Sircar*, 6 C. L. R., 276; but see *Mad. H. C. Pro., 8th Nov.* 1870, 5 Mad. H. C. R., Appx., xliii, *Weir*, p. 32, C. P. C., 349. Nor has he power to send the case for inquiry to another Magistrate.—*Queen* v. *Velayudam*, I. L. R., 4 Mad., 233; *Proceedings*,

Ch. XXIV s. 350

6 Mad. H. C. R., Appx. ii. See, however, *Reg.* v. *Mangla Bhulia*, 7 Bom. H. C. R., Cr., 69, where it was held that a District Magistrate may refer for trial to a full-power Magistrate a case submitted to such District Magistrate by a Subordinate Magistrate.

The word 'order' in this section, associated as it is with the words 'judgment and sentence,' it was held, means a final order, *i. e.*, one disposing of the case so far as the Magistrate, to whom a Subordinate Magistrate submits the proceedings of the case for higher punishment, is concerned. It does not deprive that Magistrate of the exercise of his discretion as to its being a proper case for the Sessions and of the power of committing it for trial given to him by the Code. See *Empress* v. *Abdulla*, I. L. R., 4 Bom. (F. B.), 240, and *Empress* v. *Haria Tellapa*, I. L. R., 10 Bom., 196. But see *In re Chinnimarigadu*, I. L. R., 1 Mad., 289. In *In re Bhickaree Mullick*, 10 W. R., Cr., 50, it was held, that when a case is committed to a Magistrate under this section, he alone has jurisdiction, and cannot commit to the Sessions on the ground that he considers the sentence which he is empowered to inflict insufficient.

In the case of *Empress* v. *Haria Tellapa*, I. L. R., 10 Bom., 196, a second class Magistrate under this section transmitted a case to a Subdivisional Magistrate, being of opinion that a more severe punishment should be inflicted than he himself was empowered to give. The Subdivisional Magistrate, instead of disposing of the case, returned it to the second class Magistrate for committal, and thereupon the latter committed it. It was held that, in thus returning the case, the order of the Subdivisional Magistrate was illegal, as he was bound to pass a final judgment, sentence, or order.

When the proceedings in a case tried by a Subordinate Magistrate are submitted to a District Magistrate to pass sentence upon the accused, the accused is entitled to be present at the passing of the sentence (*Reg.* v. *Ragha Naranji*, 7 Bom. H. C. R., Cr., 31), and to be heard in his defence.—*Reg.* v. *Gunesh Sircar*, 7 W. R., Cr., 38. So the accused person is entitled to be present before the District Magistrate when he takes into consideration the finding and proceedings of the Subordinate Magistrate, even though the District Magistrate does not examine the parties, or recall and examine any witness who may have already given evidence in the case, or may not call for and take any further evidence: inasmuch as the accused person will be at liberty to contend before the District Magistrate that there is no sufficient cause made against him for a conviction, and the District Magistrate, if he concur in that view, will be at liberty to order an acquittal and discharge.—*Bomb. H. C. Cir.*, 40. See note to s. 437, *post.*

In the case of *In re Chinnimarigadu*, I. L. R., 1 Mad., 289, it was held, that a Magistrate to whom a case is referred for enhancement of punishment may order the committal of the case for trial by the Sessions Court.

Appeal.—See ss. 407 and 408, *infra.*

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

350. Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and re-commence the inquiry or trial:

Provided as follows:—

(*a*) In any trial, the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard:

BENCH OF MAGISTRATES—*Absence of member of Bench—Hearing of part of case by one Bench of Magistrates. and decision by another—Criminal Procedure Code,* 1882, *ss.* 16, 350—*Rules framed by Local Government for the guidance of Benches of Magistrates under section* 16, *Criminal Procedure Code—Ultra vires.*] Rule 8 of the rules framed by the Local Government for the guidance of Benches of Magistrates is *ultra vires.* An Honorary Magistrate may not give judgment and pass sentence in a case unless he has been a member of the Bench during the whole of the hearing of the case.

HARDWAR SING *v.* KHEGA OJHA I. L. R. 20 Calc. 870

-ne whole of the evidence can decide a case. There is no provision of law which provides for a change in the constitution of Benches of Magistrates during the hearing of a case. Section 330 of the Criminal P. Code does not apply to cases tried by Benches of Magistrates. 13 C. L. R. 212 & I. L. R. 20 Cal 870 followed. Damri Thakur v. Bhowani Sahoo I. L. R. 23 Cal 194.

351. A Magistrate [illegible] offence against [illegible] witness in a case which is pending before him [illegible] to disclosed by the evidence of another witness does so under sec 191 [illegible] and not under sec 351 of the Criminal P. Code
Khudiram Mukerji v. Empress
C. W. N. Vol I p. 105.

(*b*) The High Court, or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate, may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby; and may order a new inquiry or trial. Ch. XXIV s. 351

Nothing in this section applies to cases in which proceedings have been stayed under section 346.

Act X of 1872, ss. 328, 329; Act IV of 1877, s. 156.

The power given by this section does not extend to a Sessions Judge.—*Taradu Buladu* v. *Queen*, I. L. R., 3 Mad., 112.

The words 'the whole or any' have been added, apparently, in consequence of the decision in *Queen* v. *Khan Mahomed*, 24 W. R., Cr., 53, where it was held, that the provisions of s. 328 of Act X of 1872 only applied when a Magistrate, after hearing part of the evidence in a case, ceases to exercise jurisdiction and is succeeded by another who has and exercises jurisdiction in such cases.

Ordinarily, where a case which has been partly heard by one officer is transferred to another officer for trial, the latter should hear all the evidence in the case before deciding it. In one case the High Court declined to interfere, as the prisoners did not appeal or raise any objection at the trial on that ground.—*Kopil Nath Sahai* v. *Koneeram*, 14 W. R., Cr., 3.

In the case of *Thakur Dos Manjhi* v. *Nomdar Mundul*, 24 W. R., Cr., 12, the High Court declined to interfere where the evidence was taken entirely by one Magistrate and the decision passed by another, considering that although s. 328 of Act X of 1872 did not provide for such a case, it must first be shown that the accused person had been prejudiced by the way in which his case was tried, and as this was not alleged, the Court refused to interfere. See *Kesra Ram* v. *Empress*, Panjab Rec., 1884, p. 7, and s. 537, *post*.

Notwithstanding the introduction of the words 'accused' and 'conviction,' the provisions of this section apply to an inquiry instituted under s. 107, with a view to enforcing the giving of security against a breach of the peace. And in such a case, where the Magistrate by whom only part of the evidence has been taken is succeeded by another Magistrate while such inquiry is pending, the person called upon to show cause under the latter section may insist upon the recall and re-examination of the witnesses whose evidence has already been taken by the former Magistrate. See *Buroda Kant Roy* v. *Korrimuddi Moonshee*, 4 C. L. R., 452.

It seems doubtful whether this section would apply to proceedings under s. 145, *ante*, p. 114. See *Guru Churn Sen* v. *Kali Nath Das Biswas*, 23 W. R., Cr., 62.

New trial.—As to use of record in former trial, see *In re Devi Dutt*, 7 C.L.R., 193.

351. Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of examination, for any offence of which such Court can take cognizance and which, from the evidence, he may appear to have committed; and may be proceeded against as though he had been arrested or summoned.

Detention of offenders attending Court.

When the detention takes place in the course of an inquiry under Chapter XVIII, or after a trial has been begun, the

Ch. XXV secs. 352-353 proceedings in respect of such person shall be commenced afresh and the witnesses re-heard.

See Act X of 1872, s. 104.

This section would apparently empower a Court of Session to proceed against an offender attending the Court. Section 193, *ante*, p. 172, provides that, "except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction, unless the accused has been committed to it by a Magistrate duly empowered in that behalf." The corresponding section (231) of Act X of 1872 did not contain any saving-clause, and Courts of Sessions could not, therefore, proceed under s. 104 of that Act.

A Magistrate, it was held, under the former Code, was not justified in taking a person, without any previous notice or summons, from among the audience or attendant witnesses in open Court, and in placing him in the dock to be immediately tried upon a charge which had been already commenced to be entertained against other prisoners and on which evidence has already been given. Section 104, it was said, applied to investigations preliminary to commitment for a subsequent trial, and not to cases where the trial was actually being proceeded with.—*Queen* v. *Sutherland*, 14 W. R., Cr., 20.

Courts to be open.

352. The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them :

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

Act X of 1872, s. 187; Act X of 1875, s. 150; Act IV of 1877, s. 132.

CHAPTER XXV.

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS.

Evidence to be taken in presence of accused.

353. Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII, and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

Act X of 1872, s. 191, para. 1; Act IV of 1877, s. 83, para. 1.

Chapter XVIII relates to inquiry into cases triable by the Court of Session or High Court; Chap. XX, to the trial of summons-cases by Magistrates; Chap. XXI, to the trial of warrant-cases by Magistrates; Chap. XXII, to summary trials (under s. 205, *supra*, under certain circumstances, the personal attendance of

an accused may be dispensed with); and Chap. XXIII, to the trials before High Courts and Courts of Session. Ch. XXV s. 354

As to when the attendance of a witness may be dispensed with, and his evidence taken on commission, see Chap. XL, *infra.*

Section 512, *post,* provides for the taking of evidence in the absence of an accused who has absconded.

Where three separate charges were preferred at the same time and the prisoners were convicted on the evidence recorded in one case, without hearing their defence in the other two cases, the proceedings were quashed.—*Queen* v. *Bunko Behary,* 1 W. R., Cr., 36.

Manner of recording evidence outside Presidency-towns.

354. In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

Act X of 1872, s. 332.

Presidency Magistrates.—As to the mode of recording evidence in the Courts of Presidency Magistrates, see s. 362, *post.*

Witnesses not to be kept waiting.—(*a.*) The evidence of witnesses should invariably be recorded as soon as possible after their attendance. If from unavoidable causes an adjournment is indispensable, there should be no unnecessary delay. Witnesses remaining over from one day should, as a rule, be examined at the first sitting of the Courts on the following day. By this means the public will be put to no inconvenience, and justice will be administered in a prompt and satisfactory manner.

(*b.*) Chief Magistrates of Districts should carefully supervise the returns of their subordinates, as they will be held responsible for the correction of irregularities.—*Calc. H. C. C. O., No.* 12 *of 27th November* 1865, *Wilkins,* p. 7.

Particulars to be recorded for the identification of witnesses.—All Magisterial officers shall, in the examination of prosecutors, witnesses, and prisoners, record in each deposition, statement, or defence the following particulars, which are indispensably necessary for the future identification of the parties examined, *viz.,* the name of the person examined, the name of his or her father, and, if a married woman, the name of her husband, the religion, caste, profession, and age of the party or witness, and the village and pergunnah in which he or she resides.—*Calc. H. C. C. O., No.* 19 *of 17th September* 1864, *Wilkins,* p. 8.

Particulars for the identification of prisoners.—Attention must be paid to correctness and uniformity in the manner of spelling the names of prisoners in the record of evidence. This is a point of great importance, and should meet with particular attention. Where several prisoners bearing the same or similar names are included in one trial, care should be taken, in recording the evidence given by each witness, to specify the name of the father of the person charged, whenever the name of any one of them is mentioned. Very serious inconvenience has resulted from the neglect of this precaution.—*Calc. H. C. C. O., No.* 135 *of 22nd February* 1833, *Wilkins,* p. 8.

Particulars as to recording evidence of witnesses where the meaning is doubtful.—(*a.*) In depositions in which there may be any doubt as to the exact meaning of any expression used, and in which the doubtful expression has an important bearing on the offence with which the prisoner is charged, the Court would suggest the expediency of transcribing, in Roman characters, the words actually used, in order that the Court may be in a position, on the matter coming before it, without fear of error, to determine on their exact signification, and, in consequence, to give them their due and proper weight.

(*b.*) Should any instance occur in which a foreign language is used, or in which the evidence may be delivered in a dialect to which a Judge may be unaccustomed, an interpreter should be employed (see s. 543 of the Code of Criminal Procedure,

Ch. XXV s. 355 and s. 5 of Act X of 1873).—*Calc. H. C. C. O., No.* 9 *of* 20*th August* 1865, *Wilkins*, p. 9.

The following rule is in force in Bombay :—

All Magistrates, Sessions Judges, and Assistant Sessions Judges shall, in the examination of prosecutors, witnesses, and prisoners, record in each deposition, statement, or defence the following particulars which are indispensably necessary for the future identification of the parties examined, *viz.*, the name of the person examined, the name of his or her father, and, if a married woman, the name of her husband, the caste, profession, and age of the party or witness, and the village and district in which he or she resides.—*Bombay Gazette*, 1879, pp. 471, 475.

As to taking evidence, see further notes to s. 253, *ante*.

Record in summons-cases, and in trials of certain offences by first and second class Magistrates.

355. In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in section 260, clauses (*b*) to (*k*), both inclusive, when tried by a Magistrate of the first or second class, the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same ; and such memorandum shall form part of the record.

Act X of 1872, ss. 222, 333.

See notes to s. 260, *ante*.

The offences mentioned are :—

(*b*) Offences relating to weights and measures, under ss. 264, 265, and 266 of the Indian Penal Code :

(*c*) Hurt, under s. 323 of the same Code :

(*d*) Theft, under ss. 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees :

(*e*) Receiving or retaining stolen property, under s. 411 of the same Code, where the value of such property does not exceed fifty rupees :

(*f*) Assisting in the concealment or disposal of stolen property, under s. 414 of the same Code, where the value of such property does not exceed fifty rupees :

(*g*) Mischief, under s. 427 of the same Code :

(*h*) House-trespass, under s. 448 of the same Code :

(*i*) Insult with intent to provoke a breach of the peace, under s. 504, and criminal intimidation, under s. 506 of the same Code.

(*j*) Abetment of the same offences :

(*k*) An attempt to commit any of the foregoing offences wher such attempt is an offence.

The direction that the Magistrate must make a "memorandum of the substance of the evidence of each witness as the examination of the witness proceeds," is not complied with by a mere statement that a witness deposes as the last.—*Reg.* v. *Byhavalud Surjim*, 1 Bom. H. C. R., 91 ; Bom. H. C. Cir., 257 ; *Queen* v. *Muttee*

Nushyo, W. R., Sup. Vol., 18. If the Magistrate is prevented from making the memorandum, he must record the reason of his inability to do so. Omission to make a memorandum cannot be justified except under such circumstances as render it impossible for the Magistrate or Sessions Judge to make it. Want of time cannot be accepted as a valid excuse.—*Smyth*, p. 119.

When, during the investigation of a complaint, it appears to the Magistrate that a witness is giving false evidence, so that criminal proceedings against such witness are likely to be necessary, the Magistrate will exercise a sound discretion under s. 359 in taking down at least the evidence of this particular witness at length, in the manner prescribed in ss. 356, 357, and 360.—*Calc. H. C. C. O., No.* 4, 30*th March* 1864, *Wilkins*, p. 112. See the provisions of ss. 358 and 359, *post*.

Presidency Magistrates.—As to the mode of recording evidence in Presidency Magistrates' Courts, see s. 362, *post*.

Record in other cases outside Presidency-towns.

356. In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates) and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court, by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge.

Evidence given in English.

When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

Memorandum when evidence not taken down by the Magistrate or Judge himself.

In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

Compare Act X of 1872, s. 334.

The evidence is ordinarily to be taken in the form of a narrative.—*S.* 359, *infra*. Chapter XII relates to disputes as to immoveable property, and Chap. XVIII to inquiries into cases triable by the Court of Session or High Court.

A Magistrate is competent under this section to convict an accused person on his admission of the imputed offence, and to sentence him without any further record. Any subsequent irregularity, therefore, in the mode of the record could not affect the propriety of the conviction.—*In re Chummun Shaha*, 2 C. L. R., 317.

Ch. XXV s. 357 An omission to record the evidence in the manner prescribed is so material an error, that the proceedings may be quashed.—*Khetter Monee Dassee* v. *Sreenath Sircar*, 11 B. L. R., Appx., 5.

In each deposition the name of the person examined, the name of his or her father, and, if a married woman, the name of her husband, the religion, caste, profession, and age of the party or witness, and the village or pergunnah in which he or she resides, should be recorded.—*Calc. H. C. C. O., No.* 19, 17*th September* 1864, *Wilkins*, p. 8.

357. The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates, the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation in open Court.

Language of record of evidence.

The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record :

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother-tongue.

Compare s. 335 of Act X of 1872.

In the Settlements of Port Blair and the Nicobars, the evidence of complainants and witnesses shall be recorded in the vernacular language of the officer presiding over the Court.—*Notification*, 20*th March* 1874, *Gazette of India*, 1874, p. 149.

In proceedings before the Court of Sessions at Aden, or before any Magistrate or class of Magistrates in that Settlement, the evidence of complainants or witnesses must be taken down in English by the Sessions Judge or Magistrate with his own hand, whether the vernacular language of such Sessions Judge or Magistrate is or is not English.—*Bombay Gazette*, 1873, p. 277.

In Burma, the evidence of complainants and witnesses must be taken down by all Magistrates and Sessions Judges with their own hand in the vernacular language of such Magistrates or Sessions Judges, unless such Magistrate or Sessions Judge be prevented by any sufficient reason from taking down the evidence of any complainant or witness, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation.—*Burma Gazette*, 1873, Part II, p. 7.

Throughout the Panjab, in the trial of offences punishable with death by Courts of Session, and in all trials by native Magistrates, the evidence of complainants and witnesses must be taken down by the presiding Judge himself in his own vernacular language, provided that if the vernacular language of the Judge is not English or the language in ordinary use in the district in which the Court is held, such Judge may take down the evidence in English or in the language in ordinary use in the district in which the Court is held, instead of in his own vernacular, if he be sufficiently acquainted with either of these languages.—*Panjab Gazette*, 1873, p. 76, *Smyth*, p. 118.

The following rules also are in force in the Panjab :—

1. In all trials in which sentence of death is legal, the evidence shall be taken down by the Sessions Judge himself in the English language. There may be a

counterpart in the vernacular of the Court at the discretion of the Sessions Judge for his own satisfaction. Ch. XXV secs. 358-359

2. In all other proceedings before the Court of Sessions, the evidence is to be taken down in the manner provided in s. 334 (356) of the Code, unless the Judge prefer to adopt rule 1 in such cases also.

3. European Magistrates will record the evidence in the manner laid down in s. 333 (355) in summons-cases, and in cases of the kind referred to in s. 222 (260) when tried by a Magistrate of the first or second class otherwise than at a summary trial.

4. In all other trials, European Magistrates will record the evidence in the manner laid down in s. 334 (356), unless the Magistrate prefers to adopt rule 1; but in that case he must not omit the vernacular counterpart.

The authority conferred on an officer under this section, it would seem, is personal to that officer, and remains in force only so long as he remains in the particular district in which it has been conferred. See *Proceedings*, *25th November* 1869, *5* Mad. H. C. R., Appx., ix, *Weir*, p. 11. When the authority has been conferred on any officer, all depositions taken before him should, unless for some special reason, be recorded in the vernacular.—*Ibid.*

In Madras, all applications from Judges and Magistrates for authority to take down the evidence of complainants and witnesses in their vernacular language must be made to the Local Government through the High Court. In the case of Magistrates subordinate to the Magistrate of the District, all such applications should be accompanied by an expression of the District Magistrate's opinion, whether the authority should be granted or withheld.—*Madras Proceedings*, *25th November* 1869, *5* Mad. H. C. R., Appx., ix, *Weir*, p. 11.

In depositions in which there may be any doubt as to the exact meaning of any expression, and in which the doubtful expression has an important bearing on the offence with which the prisoner is charged, it is expedient to transcribe in Roman characters the words actually used, in order that the High Court may be in a position, on the matter coming before it, without fear of error, to determine their exact signification, and in consequence to give them their due and proper weight. Should any instance occur in which a foreign language is used, or in which the evidence may be delivered in a dialect to which a Judge may be unaccustomed, an interpreter should be employed.—*Calc. H. C. C. O.*, *No.* 9, *20th August* 1865, *Wilkins*, p. 8.

Plea how recorded.—The language in which a plea is conveyed to the Court by the interpreter is the language in which it should be recorded.—*Empress* v. *Vaimbilee*, I. L. R., 5 Calc., 826.

See ss. 5, 255, and 271, *ante*.

Option to Magistrate in cases under section 355.

358. In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in section 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to in section 357, in the manner provided in the same section.

Act X of 1872, s. 336.

Mode of recording evidence under section 356 or section 357.

359. Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

Ch. XXV s. 360. The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

Compare Act X of 1872, s. 338.

The Panjab High Court has found it necessary to lay down the following rules:—

I. In police-cases, where recognizances are taken by the Police-officer for the witnesses' appearance, the date entered in column 2 of the Witness Register ('date of arrival') shall be the date entered in the recognizance (s. 130, Criminal Procedure Code [s. 170]). The witnesses in such cases ordinarily arrive on the day fixed, or before it; and when the witness does not arrive by such date, this should be explained in the column of remarks, and the actual date of arrival entered in column 2. But ordinarily the date of arrival will be checked by the date mentioned in the recognizance, which is filed with the record. In checking the register, therefore, Magistrates should turn up a few cases and compare the dates in the register with the dates in the recognizances filed with the case; and if any discrepancy exists which is unexplained in the column of remarks, the official who keeps the register should be called to account. As a necessary consequence, Sundays and holidays will be included in calculating the period of detention, and where any considerable delay has resulted from the intervention of holidays, this should be explained in the column of remarks; but Magistrates should make special efforts to dismiss all witnesses in attendance on the day preceding a holiday.

II. Similarly in cases where the witness appears on a summons issued from the Magistrate's Court, the date entered in column 2 of the register should be the date mentioned in the summons as that fixed for his appearance. The same checks will apply.

III. A register in the prescribed form shall be kept up in every Magistrate's Court by one of the officials of the Court. It should be initialed by the Magistrate every week.

IV. Where delay has occurred, and any considerable part of it is owing to the case having been detained in the Court of the Magistrate of the District, an explanation to that effect should be entered in the column of remarks.

V. The Magistrate of the District should check every month a few of the diaries kept up in the Courts of his subordinates, and in the quarterly statement of attendance of witnesses he will certify that he has done so, adding remarks as to the result of his examination. If this certificate is omitted when the quarterly statement is received by the Commissioner, that officer should send back the statement, in order that the omission may be supplied.—*Smyth*, p. 128.

Procedure in regard to such evidence when completed.

360. As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

If the witness deny the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

If the evidence be taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the

evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands. Ch. XXV secs. 361-362

Act X of 1872, s. 339.

The provisions of this section being for the protection of witnesses only, the fact that witnesses did not understand their depositions when read over, although they may not have required them at the time to be interpreted, affords no ground for an application by the accused to set aside a conviction.—*In the matter of Okhoy Kumar*, 7 C. L. R., 393. See, however, the case of *Queen* v. *Issur Raut*, 8 W. R., Cr., 63. There the evidence was taken down by the Magistrate in English, and no memorandum was attached to it, stating that it was read over to the witness in a language which he understood, and it was held, that there had been an error in law by which the accused was materially prejudiced. The memorandum required by this section ought always to be appended to the depositions.—*Queen* v. *Hossein Sirdar*, 13 W. R., Cr., 17.

This section does not apply to the examination of prisoners.—*Queen* v. *Radhoo Jana*, 12 W. R., 44. Section 364 provides for the recording of the examination of accused persons.

This section does not seem to make it necessary that the evidence when completed should be read over to witness by the Court itself.

Section 205 provides for an accused, in certain circumstances, appearing by pleader.

Interpretation of evidence to accused or his pleader.

361. Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

If he appears by pleader, and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

Act X of 1872, s. 340, using the word 'pleader' for 'agent.'

See s. 543, *infra*, as to the duties of interpreters. As to affirmation or oath to be taken by interpreters, see Indian Oaths Act (X of 1873), s. 5.

This section relates only to the oral evidence of witnesses. As to documentary evidence, although a prisoner has a right to have all or any part of any document used on his trial translated or interpreted to him, yet where a document is put in for the purpose of merely giving formal proof of that which is an uncontested fact, it is not necessary to interpret it at length. It would be sufficient if the prisoner was made to understand what the document was, and for what purpose it was used.—*Queen* v. *Ameeroddeen*, 15 W. R., Cr., 25.

See *Empress* v. *Vaimbilee*, I. L. R., 5 Calc., 826.

Record of evidence in Presidency Magistrates' Courts.

362. In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees, or imprisonment for a term exceeding six months, he shall either take down the evidence of the witnesses with his own hand, or cause it

Ch. XXV secs. 363-364

to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

Sentences passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence.

See Act IV of 1877, s. 115. In that section it was directed that "no Presidency Magistrate shall impose a fine exceeding Rs. 200, or imprisonment for a term exceeding six months, unless he *has* recorded the evidence of the witnesses." It will be observed that a material alteration has been made in the present Code. From the wording of this section it would appear to be necessary, either that the Magistrate shall make up his mind as to the sentence to be passed or likely, from the nature of the case before him, to be passed, before the evidence is gone into, or that, having determined to pass such sentence as is mentioned in the section, he shall recall and re-examine the witnesses and record their evidence. Probably what the Legislature meant to say was, that in cases in which the Magistrate may impose a fine exceeding Rs. 200, or imprisonment exceeding six months, he shall take down the evidence in the manner directed. Compare also Act X of 1872, s. 335. As to the penultimate para., see Act X of 1872, s. 338; Act IV of 1877, s. 115.

363. When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Remarks respecting demeanour of witness.

Act X of 1872, s. 341.

364. Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter or the Chief Court of the Panjab, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or English; and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

Examination of accused how recorded.

When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examin-

364. Where a Magistrate before whom an accused person is brought omits to record statements made by the accused, he does not thereby make himself a witness and so become disqualified from trying the case.

Queen Empress v. Fattah Chand
I.L.R. 24 Cal 497.

ation was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused. Ch. XXV s. 364

In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, unless he is a Presidency Magistrate, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

Nothing in this section shall be deemed to apply to the examination of an accused person under section 263.

Act X of 1872, s. 346, paras. 1, 2, 3, and 4. See also Act IV of 1877, ss. 84, 123.

The last clause of s. 346 of Act X of 1872 provided that the accused person should sign the record or attest it by his mark. This section, it will be seen, provides only that the record shall be signed by the accused. There is no definition of signature in the Code, and it may be a question as to whether attestation by a mark would be sufficient. Probably such attestation would be considered sufficient.

The last clause of this section is new. Section 263 deals with the record in summary trials.

As to the effect of omissions by a Magistrate to comply with the requirements of the section, see s. 533, *infra*.

Examination of accused.—It must be borne in mind, as pointed out in the notes to s. 342, that the Court is not competent to subject the accused to cross-examination.

In the case of *Empress* v. *Yakub Khan*, I. L. R., 5 All., 253, the Court (STUART, C. J., and STRAIGHT, J.) said: "Although the statement (of the accused in the case) was not recorded by question and answer as it should have been, we find a certificate signed by the Magistrate to the effect that such statement was taken in the presence and hearing of, and contains accurately the whole of the statement made by, the accused. We may here remark that Magistrates, as a rule, do not as strictly follow the provisions relating to the taking the examination of accused persons as they should. We think it well to point out, in reference to ss. 342 and 364 of the new Code, that while it is not intended to empower them to cross-examine persons charged before them, they are nevertheless to put any questions which appear necessary at any stage of an inquiry or trial, and particularly when all the witnesses have been examined, 'for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.'"

Where the provisions of this section are not observed, and there is no certificate by the Magistrate that the examination of the accused was taken in the hearing and in the presence of that officer, and there is no statement that that examination contains the whole statement of the accused, a Sessions Judge acts rightly in rejecting the evidence and not allowing it to go to the assessors.—*Queen* v. *Radhoo Jana*, 12 W. R., Cr., 44. See remarks of Court in *Empress* v. *Yakub Khan*, I. L. R., 5 All., 253

There is nothing which necessitates a Magistrate to take down the statement of the accused in his own hand. It is enough that he appends a certificate that the examination was conducted in his presence and hearing, and contains accurately all that was stated by the accused person.—*Queen* v. *Lucky Narain Dutt*, 20 W. R., Cr., 50; *Reg.* v. *Shivya*, I. L. R., 1 Bom., 219.

Ch. XXV s. 364 The memorandum must now be in the handwriting of the presiding officer, and not under his hand only,—that is to say, signed by him. See *Queen* v. *Rezza Hossein*, 8 W. R., Cr., 55.

A statement under promise of conditional pardon made by an accomplice who afterwards retracts the statement, cannot be used as evidence against the prisoner.—*Queen* v. *Hardewar*, 5 All., 217.

See, however, the cases of *Joyudee Paramanick*, 7 C. L. R., 66, and *Nanha Malla* v. *Empress*, 13 C. L. R., 326, where the Calcutta High Court expressed a doubt whether such a statement could be used under these circumstances. See notes to ss. 298 and 339, *supra*.

The omission of a Magistrate to have recorded in the vernacular questions asked in the examination of the accused person, does not necessarily render that examination inadmissible as evidence.—*Titu Mya, Appellant*, 1 C. L. R. (F. B.), 1; (S. C.) I. L. R., 8 Calc., 618, note. So in a subsequent case, where the confession of an accused person was recorded in a simple narrative instead of in the shape of question and answer as required by the Code of Criminal Procedure, and there was nothing in the character of the confession or in the circumstances of the case to lead to the inference that the accused had been prejudiced by the error, it was held that the irregularity did not affect the admissibility of the statement in evidence.—*In re Bunshi Sheikh*, I. L. R., 8 Calc., 816. See also *In re Empress* v. *Sagambur*, 12 C. L. R., 120.

The attestation required by this section of the Criminal Procedure Code is unnecessary when a confession is made in Court to the officer trying the case at the time of trial (*In re Chumman Shah*, I. L. R., 3 Calc., 756), for upon the admission of the accused the Court is competent to sentence him without any further record under s. 255, *supra*.

Under s. 346 of Act X of 1872 it was held, that the direction enjoining that an accused person shall sign the record of his confession is not satisfied by the following,—"Signature of A.B. (the accused), the handwriting of C. D."—*Reg.* v. *Daya Anand*, 11 Bom. H. C. R., 44. In that case the High Court reversed the conviction and sentence, but it does not appear that the accused was professionally represented. In a later case (*Reg.* v. *Devo Dayal*, 11 Bom. H. C. R., 237), where the prisoner was represented by a pleader who had an opportunity of objecting to the admissibility of an unsigned confession, and did not, the conviction was upheld.

An accused person who refuses to sign a statement made at his trial in answer to questions put by the Court does not commit an offence punishable under s. 180 of the Penal Code.—*Imperatrix* v. *Susapa*, I. L. R., 4 Bom., 15.

The certificate need not be signed by the prisoner.—*Queen* v. *Rezza Hossein*, 4 Wym. Cr. Rul., 23.

In the case of *Nisai Mistri* v. *Empress*, 6 C. L. R., 353; (S.C.) I. L. R., 5 Calc., 958, a certificate which contained the words 'taken by me,' but in which the Magistrate omitted to record that the prisoner's statement was taken in his hearing, was treated as substantially a compliance with s. 346 of Act X of 1872.

Section 533, *post*, provides that if any Court before which a confession or the statement of an accused person recorded under s. 164 or s. 364 is tendered in evidence, finds that the provisions of such section have not been fully complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded, and notwithstanding anything contained in the Indian Evidence Act, s. 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

Under s. 287, *ante*, in trials before juries or with assistance of assessors, the examination of the accused duly recorded by the committing Magistrate shall be tendered by the prosecution and read as evidence.

Where more persons than one are being tried, the provisions of s. 30 of the Evidence Act must be borne in mind. That section of the Evidence Act provides that "when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Magistrate passing sentence before finishing his judgment. Irregularity.
Damu Senapati v. Sridhar Rajwar
I.L.R. 21. C. 121

366, 367. A sentence which has been passed or a direction that an accused be set at liberty which has been given at a Sessions trial, before the judgment required by § 367 has been written is illegal.
Queen Empress v. Har Gobind Sing I.L.R. 14 All. 242

Magistrate passing sentence before finishing his judgment.
I.L.R. 21 Cal. 121

Illustrations.

"(*a*.) A and B are jointly tried for the murder of C. It is proved that A said, 'B and I murdered C.' The Court may consider the effect of this confession as against B.

"(*b*.) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, 'A and I murdered C.' This statement may not be taken into consideration by the Court as against A, as B is not being jointly tried."

Record of evidence in High Court.

365. Every High Court established by Royal Charter and the Chief Court of the Panjab may from time to time by general rule prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed.

See Act X of 1875, s. 68. The Chief Court of the Panjab is now included.

CHAPTER XXVI.

OF THE JUDGMENT.*

Mode of delivering judgment.

366. The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court either immediately or at some subsequent time of which due notice shall be given to the parties or their pleaders; and the accused shall, if in custody, be brought up, or if not in custody, shall be required to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only, in which case it may be pronounced in the presence of his pleader.

Compare Act VIII of 1859, s. 183, and Act X of 1872, s. 462. The proviso as to dispensing with the personal attendance of the accused corresponds with the first part of para. 3, s. 211 of Act X of 1872.

Under s. 205, whenever a Magistrate issues a summons he may dispense with the personal attendance of the accused. And under s. 424, *post*, unless an Appellate Court otherwise directs, the accused shall not be brought up or required to attend to hear judgment delivered by such Court.

By a rule of the Bombay High Court dated the 4th February 1873, it was directed "that Sessions Judges and Magistrates shall inform the officer commanding the regiment or corps to which he belongs, when any person serving under the Government of Bombay in the Military Department is convicted in a Criminal Court."—*Bombay Gazette*, 1873, p. 110.

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* Section 424, *infra*, provides that the rules in this chapter as to the judgment of a Criminal Court of original jurisdiction shall apply, as far as may be practicable, to the judgment of any Appellate Court other than a High Court, provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up or required to attend to hear judgment delivered.

Ch. XXVI s. 367

In the Panjab, in every case in which a military officer or a soldier is sentenced by a Criminal Court to a fine of Rs. 200 or upwards, or to imprisonment otherwise than in default of paying a fine not amounting to Rs. 200, the Court shall send a copy of its final order, *proprio motu*, to the immediate superior of the person convicted.—*Smyth*, p. 148.

In Bengal, Judicial Commissioners, Sessions Judges, and Magistrates are directed to forward to the Military Department of the Government of India a copy of the conviction and sentence in all cases in which persons serving under the Government of India in that department are convicted in a Criminal Court.—*Calc. H. C. C. O.*, *No.* 6 *of* 17*th July* 1871, *Wilkins*, p. 139.

Language of judgment.

Contents of judgment.

367. Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon, and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it.

It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

Judgment in alternative.

When the conviction is under the Indian Penal Code, and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted, and direct that he be set at liberty.

If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed:

Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

As to the first clause of this section, compare Act X of 1872, s. 463, and Act X of 1877, s. 200, substituting 'language of the Court' for 'language of the district.' As to language of Court, see s. 556, *infra*.

The second clause corresponds substantially with s. 464 of Act X of 1872, para. 1; see also Act VIII of 1859, s. 185.

As to the third clause, compare the last part of cl. 1 of s. 461, Act X of 1872, and the last part of para. 1 of s. 464 of the same Act.

The fourth clause embodies the provisions of s. 461 of Act X of 1872, last clause, and of the final sentence of para. 1 of s. 464.

The fifth clause corresponds with s. 287, para. 2, of Act X of 1872.

367. It cannot be that merely because the form of a judgment does not exactly comply with all the requirements of section 367 Cr. P. Code it is not a valid judgment.
Rohimuddi v. The Queen Empress.
I. L. R. 20 C. 353

JUDGMENT—*Form and contents of judgment—Criminal appeal, Judgment in—Criminal Procedure Code, 1882, sections 367, 424.*] A Deputy Commissioner, after hearing an appeal from a Deputy Magistrate who had convicted the appellants of rioting, gave the following judgment:

"After hearing the arguments of the pleader for the appellants and examining the record I am of the opinion that the lower Court had ample ground for convicting the accused of rioting. I do not consider the sentence too severe. Appeal dismissed." *Held*, that this was not a judgment within the meaning of sections 367 and 424 of the Criminal Procedure Code, and that the appeal must be reheard. *Kamruddin Dai* v. *Sonatun Mandal*, I. L. R., 11 Calc., 419, and *In the matter of the petition of Ram Das Maghi*, I. L. R., 13 Calc., 110, followed. I. L. R. 22 Cal. p. 241.

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in accordance with section 367 & 424 Cr. P. Code but when the judgment though not a corrine [elaborate] affords is clear indication that the court duly considered the evidence, it is a good judgment and should not be set aside.
In the matter of Kasimuddi & others v. Queen Empress
C. W. N. Vol I C I p 169.

As to the last clause, compare Act X of 1872, s. 255, last paragraph, and s. 464, para. 4. Ch. XXVI s. 367

A Sessions Judge should record findings, whether of conviction or acquittal, on all the charges under which prisoners are committed for trial.—*Reg.* v. *Mahomed Ali*, 13 W. R., Cr., 50.

What is substantially required by the Code from all Courts is a judgment or final order, stating all such matters as are necessary to enable the appellate or revising authority to form an accurate and well-founded opinion as to what are the conclusions arrived at and the propriety of those conclusions, and in case of a conviction, of the punishment awarded.—*Mad. H. C. Pro.*, *12th November* 1878, *Weir*, p. 18.

It has been held that, as the section allows a judgment to be given in the alternative where it is doubtful under which of two sections or of two parts of the same section an offence falls, an alternative finding that a trespass was committed with one or other of two intents, either of which would make it criminal trespass as defined by s. 441 of the Penal Code, is sufficient.—*Bura* v. *Empress*, Panjab Rec., 1886, p. 7.

The judgment or final order should be one complete document containing the charge, finding and the reasons for the finding, the offence of which the accused person is convicted, and the punishment to which he is sentenced. The sentence should not be recorded in the form of a separate proceeding or order, but should form part of the judgment or final order.—*Mad. H. C. Pro.*, *19th August* 1878, *Weir*, p. 18.

In the case of *Kamruddin Dai* v. *Sonatun Mundal*, I. L. R., 11 Calc., 449, a Sessions Judge, after hearing an appeal, delivered the following judgment:—"It is urged that the evidence is quite untrustworthy and that the decision should be reversed. The depositions have been gone through and commented on at considerable length. The Court finds no ground for interference. The appeal is dismissed." The High Court held that this was not a sufficient compliance with this section. See *Hakim Singh* v. *Emp.*, Panjab Rec., 1884, p. 54, and s. 424, *post*.

Section 72 of the Indian Penal Code provides: "In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all."

Under s. 236, if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences. That section, it was held, applies to cases in which, not the facts are doubtful, but the application of the law to the facts is doubtful. Judgment in the alternative cannot be passed in cases in which it is doubtful whether the accused person is guilty of any one of the several offences charged, but where it is doubtful of which of those offences he is guilty.—*Queen* v. *Jamurha*, 7 N. W. P., 137.

In *Reg.* v. *Mahomed Hoomayoon Shaw*, 13 B. L. R., 324; (S. C.) 21 W. R., Cr., 72, where a person was convicted of giving false evidence upon an alternative charge in the form given in Sched. III of Act X of 1872, the majority of the Full Bench (Jackson and Phear, JJ., dissenting) held, that the conviction was good notwithstanding that the jury had not distinctly found which of the two statements was false. Jackson, J., was of opinion that such a charge was bad, and further, that an alternative finding upon such a charge was invalid, while Phear, J., considered that although a person might be lawfully tried upon such a charge, the jury, or the Court, must, for a conviction, find specifically which branch of the alternative was true.

Where perjury is assigned upon a distinct allegation, the evidence of its falsity must be regularly taken in the case in which it is tried. If the whole proof consists of two conflicting statements, an alternative charge and finding are the regular course.—*Mad. H. C. Pro.*, *30th November* 1874, *Weir*, p. 5; *Proceedings*, 4 *Mad. H. C. R.*, 1874, *Weir*, pp. 4, 5. But an alternative finding should not be resorted to until both the committing officer and the Sessions Judge are satisfied that no reliable evidence is procurable in support of one or other of the charges, and such a finding cannot be based on a charge of giving false evidence upon two state-

Ch. XXVI s. 368 ments which are not absolutely contradictory the one of the other, nor when in one of them the accused gives only hearsay evidence. Every presumption in favour of the possible reconciliation of the statements must be made.—*Queen* v. *Bedoo Noshyo*, 12 W. R., Cr., 11. See *Habibullah* v. *Empress*, I. L. R., 10 Calc., 937.

In Bengal, Sessions Judges in all cases in which they may convict of culpable homicide not amounting to murder, shall invariably mention in their remarks on the trial, within which of the exceptions noted under s. 300 of the Indian Penal Code the culpable homicide was held to come so as not to amount to murder.

Sessions Judges shall invariably record their opinion whether the act by which death was caused was done with the intention of causing death (1), or of causing such bodily injury as was likely to cause death (2), or with the knowledge that it was likely to cause death, but without any intention to cause death, or to cause such bodily injury as was likely to cause death.—*Calc. H. C. C. O., No. 5 of 6th February* 1863, *Wilkins*, 1st Edition, p. 23.

1. Penalty, transportation for life, or imprisonment of either description for a term which may extend to 10 years, and fine.

2. Penalty, imprisonment of either description for a term which may extend to 10 years, or fine, or both.

The words 'heads of the charge to the jury' must be construed reasonably, and include such statement on the part of the Sessions Judge as will enable the Appellate Court to decide whether the evidence has been properly laid before the jury, or whether there has been any misdirection on the charge.—*Queen* v. *Kasim Shaikh*, 23 W. R., Cr., 33.

Charge to the Jury need not be written before being delivered.—It is not necessary that the direction to the jury should be reduced to writing before delivery; but it is essential that the 'heads of charge' (s. 367) placed upon the record should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court, in the event of an appeal, to see distinctly whether the case was fairly and properly placed before the jury.—*Calc. H. C. C. M., No. 2 of 4th March* 1875, *Wilkins*, p. 116.

Sessions Judges should, in order to assist the inquiries of the District Magistrates regarding the cause of an acquittal in the Sessions Court, set forth clearly in the judgment what, in their opinion, has led to that result.—*Calc. H. C. C. O., No. 5 of 21st September* 1880, *Wilkins*, p. 116.

Calendars.—Subordinate Judges should submit to the District Magistrate a calendar of every case in which conviction takes place within twenty-four hours from sentence being passed. This enables a District Magistrate at once to take measures towards rectifying injury done by an illegal sentence.—*Bombay H. C. Cir.*, p. 43.

A separate sentence should be passed on each charge or head of the charge.—*Bombay H. C. Cir.*, p. 258.

The Madras High Court has directed that Magistrates should indicate in their judgment beneath their signatures the extent of the magisterial powers with which they have been invested, adding that the omission to do so frequently impedes the exercise of the powers of revision possessed by the High Court. See *Mad. H. C. Pro.*, 27*th July* 1871, 26*th November* 1874, *and* 3*rd February* 1876, *Weir*, p. 19.

Sentence of death.

368. When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

Sentence of transportation.

No sentence of transportation shall specify the place to which the person sentenced is to be transported.

As to the first clause, compare Act X of 1872, s. 321; Act X of 1875, s. 113. The second clause corresponds with the last paragraph of s. 319 of Act X of 1872.

As to submitting a sentence of death for confirmation, see Chap. XXVII; and as to execution, see ss. 381, 382, *infra*.

For form of warrant of sentence of death, see Sched. V, No. 35.

The following rule as to the descriptive roll of a person sentenced to transportation for life is in force in the Panjab :—

A statement shall be prepared by the Magistrate of the District in which the prisoner was committed to the Session, giving a description of the convict and an account of his antecedents and of the offence he has committed. This statement should be prepared immediately after the sentence has been pronounced by the Sessions Judge, and should be forwarded to the Superintendent of the Jail, where the prisoner is confined, to be attached to the warrant. The statement should be in the prescribed form, and a copy of it should be kept in the Magistrate's Office.—*Smyth*, p. 107.

Court not to alter judgment.

369. No Court other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in section 395, or to correct a clerical error.

Act X of 1872, s. 464, para. 1, second sentence.

Section 395 relates only to a sentence of whipping, which cannot be carried out owing to the state of health of the prisoner. Under the corresponding section of the former Code, which was slightly different, it was held that, except under the circumstances referred to in s. 395, no Criminal Court, whether a High Court (*Queen* v. *Mehtarji Gopalji*, 7 Bom. H. C. R., Cr. Cas., 67 ; *Queen* v. *Godai Raout*, 5 W. R., Cr., 61 ; (S. C.) 1 Wym Cr. Rul. (F. B.), 63 ; *In re Krishno Churn*, 17 W. R., Cr., 2), a Sessions Court (*Queen* v. *Poran Mal*, 23 W. R., Cr., 49), or a Magistrate (*Reg.* v. *Tukia Valad Ganji*, 1 Bom. H. C. R., 3), has power to review or alter a sentence when it has been formally recorded, and a lower Court has no power to quash its own conviction though illegal.—*In re Gunowree Bhooea*, 6 W.R., Cr., 70. It would seem from the terms of this section, however, that a High Court has power to alter or review its judgment. But it has been said that the provisions of this section, so far as they affect the High Court, apply merely to questions arising in its original criminal jurisdiction and which are recorded and subsequently disposed of under s. 434, *post*, and the Letters Patent. See *per* BROADHURST, J., *Empress* v. *Durga Charan*, I. L. R., 7 All., 672. See also *In re Abdool Sobhan*, I. L. R., 8 Calc., 63.

If a Sessions Judge, after pronouncing and signing the judgment or order, should discover any error in the proceedings, the proper course is to apply to the High Court for orders.—*Mad. H. C. Pro.*, 13*th Nov.* 1873, *Weir*, p. 17. Where a Judge added a note to his judgment throwing doubts on the conclusion at which he had arrived on the evidence, STUART, C. J., described the proceeding as most unwarrantable.—*Empress* v. *Chattar Singh*, I. L. R., 2 All., 33.

The High Court has no power under this section to review an order dismissing an application for revision made by an accused person, and the only remedy is by appeal to the prerogative of the Crown as exercised by the Local Government. —*Empress* v. *Durga Charan*, I. L. R., 7 All., 672. See s. 434, *post* ; *Reg.* v. *Godai Raout*, 5 W. R, Cr., 61 ; *Empress* v. *Fox*, I. L. R., 10 Bom. (F. B.), 176.

In the case of *Rami Reddi* v. *Seshu Reddi*, I. L. R., 3 Mad., 48, where a Sessions Judge, on appeal, annulled the conviction of a Magistrate, but omitted to order a retrial at the time under s. 284 of Act X of 1872, corresponding with s. 423 of the present Code, it was held he was not precluded by s. 464 of that Act (s. 369 of the present Code) from passing such an order subsequently.

Presidency Magistrate's judgment.

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars :—

(*a*) the serial number of the case ;

(*b*) the date of the commission of the offence ;

(*c*) the name of the complainant (if any) ;

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(*d*) the name of the accused person, and (except in the case of an European British subject) his parentage and residence ;

(*e*) the offence complained of or proved ;

(*f*) the plea of the accused and his examination (if any) ;

(*g*) the final order ;

(*h*) the date of such order ; and

(*i*) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

Act IV of 1877, s. 114. Clause (*i*) corresponds with s. 126 of the same Act.

Judgment to be explained and copy given to accused.

371. The judgment shall be explained to the accused, and, on his application, a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case, be given free of cost.

In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

Case of person sentenced to death.

When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Compare Act XI of 1874, s. 41. The proviso that such copy shall in any case 'other than a summons-case' be given free of cost is new. Under s. 25 of Act XI of 1874, any person affected by a sentence or other order passed by a Criminal Court desiring to have a copy of the charge to the jury, was entitled to be furnished therewith on payment, unless the Court for some special reason saw fit to furnish it free of cost.

As to the last clause of this section, compare Act X of 1872, s. 271A ; Act XI of 1874, s. 22. The time within which the appeal must be filed is seven days from the date of the sentence.—Limitation Act, XV of 1877, sched. ii, art. 150.

Section 548, *post*, provides that if any person affected by a judgment or order passed by a Criminal Court, desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith, provided that he pay for the same, unless the Court for some special reason thinks fit to furnish it free of cost.

All prosecutors whose charges are dismissed are affected by the order of discharge, and are, therefore, entitled to obtain copies of the order made by, and of the depositions taken before, the Magistrate.—*Bank of Bengal* v. *Dinonath Roy*, I. L. R., 8 Calc., 166 ; (S. C.) 10 C. L. R., 190.

(*a*.) In exercise of the powers conferred by s. 35 of the Court Fees Act, VII of 1870, and in supersession of the notifications noted on the margin, the Governor-General in Council remitted the fees payable under the said Act on the following documents, namely :—

(1.) Copy of a charge framed under s. 210 of the Code of Criminal Procedure, 1882, or of a translation thereof, when the copy is given to an accused person.

(2.) Copy of the evidence of supplementary witnesses after commitment, when the copy is given under s. 219 of the said Code to an accused person. Ch. XXVI s. 372

(3.) Copy or translation of a judgment in a case other than a summons-case, and copy of the heads of the Judge's charge to the jury, when the copy or translation is given under s. 371 of the said Code to an accused person.

(4.) Copy or translation of a judgment in a summons-case, when the accused person to whom the copy or translation is given under s. 371 of the said Code is in jail.

(5.) Copy of an order of maintenance, when the copy is given under s. 490 of the said Code to the person in whose favor the order is made, or to his guardian, if any, or to the person to whom the allowance is to be paid.

(6.) Copy furnished to any person affected by a judgment or order passed by a Criminal Court of the Judge's charge to the jury, or of any order, deposition, or other part of the record, when the copy is not a copy which may be granted under any preceding clause of this notification without the payment of a court-fee, but is a copy which, on its being applied for under s. 548 of the said Code, the Judge or Magistrate, for some special reason to be recorded by him on the copy, thinks fit to furnish without such payment.

(7.) Copies of all documents furnished under the orders of any Court or Magistrate to any Government Advocate or Pleader, or other person specially empowered in that behalf for the purpose of conducting any trial or investigation on the part of the Government before any Criminal Court.

(8.) Copies of all documents which any such Advocate, Pleader or other person is required to take, in connection with any such trial or investigation, for the use of any Court or Magistrate, or may consider necessary for the purpose of advising the Government in connection with any criminal proceedings.

(9.) Copies of judgments or depositions required by officers of the Police Department in the course of their duties.—*Notification, Government of India, No.* 310 *of* 21*st January* 1886, *C. O. No.* 1 *of* 12*th February* 1886, *Wilkins, Addenda*, p. 103.

In exercise of the powers conferred by s. 35 of the Court Fees Act (VII) of 1870, the Governor-General in Council remitted the court-fees payable under cls. 6, 7, and 9 of Sched. I of the Act on copies furnished by the Criminal Courts for the private use of persons applying for them.

But this notification is not to be deemed to exempt copies furnished thereunder from the payment of the fees chargeable on such copies when filed, exhibited or recorded in any Court of Justice, or received by any public officer.—*Notification of Government of India, No.* 1361 *of* 24*th June* 1881, *C. O. No.* 9 *of* 7*th September* 1881, *Wilkins*, p. 118.

The following rule is in force in the Panjab :—

In all cases in which a person is sentenced to death, the Sessions Judge should, as directed in s. 271A (of the Code of Criminal Procedure, Act X of 1872), explain to the condemned man that he must file his appeal in the Sessions Court within seven days. When an appeal does not accompany the record of the case submitted for confirmation of the sentence of death, the Sessions Judge should certify that no appeal has been filed within the prescribed period notwitstanding the law having been explained to the accused, *Smyth*, p. 97.

In the North-Western Provinces, the Sessions Judge must record whether the convict desires to appeal, and that the convict was informed that his appeal must be made within seven days.—*N. W. P. Gazette*, 1873, p. 101. In Madras, the High Court has laid down that, in case of appeals by prisoners sentenced to death, it is the duty of the District Magistrate to telegraph to the Government Pleader to appear for the Crown, *in the event of the prisoner retaining counsel* before the High Court.—*Madras Notification*, 9*th July* 1874, *Weir*, p. 73. The italics are in the original.

372. The original judgment shall be filed with the record of proceedings, and where the original is recorded in a different language from that of the Court, and the accused so re-

Judgment when to be translated.

Ch. XXVII Secs. 373-374 quires, a translation thereof into the language of the Court shall be added to such record.

Act X of 1872, s. 464, para. 3.

Court of Session to send copy of finding and sentence to District Magistrate.

373. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

Act X of 1872, s. 302, para. 1.

In Madras, it seems that the finding and sentence should be communicated by the Magistrate to the Superintendent of Police.—*Mad. H. C. Pro.*, 19*th June* 1866, *Weir*, p. 38.

The following rule is in force in Bombay:—

The Court of Sessions shall, at the conclusion of every trial of prisoners committed thereto, communicate the result thereof to the committing authority for his information.—*Bombay Gazette*, 1879, pp. 471, 475.

In Bengal, Sessions Judges are directed to give every facility to Magistrates and District Superintendents of Police for inspecting the records of cases in their Courts and for the preparation of copies by clerks sent by the District Magistrate—care being taken that the records are not removed from the Judge's office.—*C. O. No.* 5, *dated* 21*st September* 1880, *Wilkins*, p. 116.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

Sentence of death to be submitted by Court of Session.

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

Act X of 1872, s. 287, para. 1.

As to proceedings under this chapter, see s. 537, *infra*.

For form of warrant of commitment under sentence of death, see Sched. V, No. 34.

A Sessions Judge is not authorized to sentence a prisoner convicted of murder to anything less than transportation for life; but if a prisoner be convicted of murder, and the Judge, instead of sentencing him capitally, sentence him to transportation for life, he must explain his reasons for so doing, and may submit any mitigating circumstances for the consideration of Government.—*Queen* v. *Dabee*, W. R., Sup. Vol., 27.

In referring a case to the High Court for the confirmation of a sentence of death, the particulars of the evidence and the Judge's remarks are to be embodied in a letter addressed to the Registrar. An English translation of the whole of the evidence given at the trial should also be submitted.—*Mad. H. C. Pro.*, 6*th and* 15*th August* 1862, *Weir*, p. 33. Sessions Judges should be careful also to note on their letter of reference whether the prisoner has signified his intention to appeal. —*Mad. H. C. Pro.*, 3*rd April* 1873, *Weir*, p. 33.

It is improper for a Sessions Judge, in referring a sentence of death for confirmation, to recommend the prisoner to mercy, as the law allows an alternative sentence, and the responsibility of deciding whether there are sufficient grounds for not sentencing the prisoner to death rests upon the Sessions Judge himself.—*Mad. H. C. Pro.*, 24*th April* 1886, *Weir*, p. 33. See also the remarks of the Court in the case of *Empress* v. *Bhup Singh*, I. L. R., 2 All., 771.

Power to direct further inquiry to be made or additional evidence to be taken.

375. If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself or direct it to be made or taken by the Court of Session.

Such inquiry shall not be made, nor shall such evidence be taken, in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

Compare Act X of 1872, s. 289. The High Court now has power itself to make a further inquiry or to take additional evidence.

Power of High Court to confirm sentence or annul conviction.

376. In any case submitted under section 374, whether tried with the aid of assessors or by jury, the High Court—

(*a*) may confirm the sentence, or pass any other sentence warranted by law, or

(*b*) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(*c*) may acquit the accused person :

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

Compare Act X of 1872, s. 288. The words "and convict the accused of any offence of which the Sessions Court might have convicted him" have been added. This alteration has been made, apparently, in consequence of the decision of the Bombay High Court in the case of *Reg.* v. *Balapa bin Dundapa*, I. L. R., 1 Bom., 639, where it was held, under s. 288 of Act X of 1872, that the High Court, to which reference was made by a Court of Session for confirmation of a sentence of death on conviction of murder, could not, in the absence of appeal, alter the conviction to one of culpable homicide not amounting to murder, if it was of opinion that the evidence did not establish the former but the latter offence. It must order a new trial for that purpose.

Ch. XXVII secs. 377-379

When a case is referred under this section, the High Court is bound under the preceding section to go into the facts of the case, although the conviction was by the verdict of a jury.—*Reg.* v. *Jaffir Ali*, 19 W. R., Cr., 57. The result of these two sections appears to be that, in the event of the conviction of a prisoner by a jury for the crime of murder, and sentence of death following thereon upon the reference which must be made to the High Court under s. 374 for confirmation of the sentence, the High Court has the power under this section to acquit the prisoner on the facts, although if the prisoner had been sentenced to transportation for life instead of to death, and had simply himself appealed, the Court would not have been able to disturb the verdict of the jury on the facts. See *Queen* v. *Koonjo Leth*, 11 B. L. R., 19, *per* PHEAR, J. See s. 418, *infra*, as to appeals.

Where a Division Court of the High Court at Allahabad ordered a Magistrate, who had refused to inquire into a charge of murder on the ground that he had no jurisdiction to inquire into the charge, and the Magistrate inquired into the case and committed the prisoner to the Court of Session, by which Court the prisoner was convicted and sentenced to death,—it was held, on the case being referred to a Full Bench of the High Court for confirmation, that, in determining whether the sentence should be confirmed, the Full Bench was not precluded by the order of the Division Court from considering whether the accused person had been convicted by a Court of competent jurisdiction.—*Empress* v. *Sarmukh Singh*, I. L. R., 2 All., 218.

In the case of *Bhoodoo Jolaha*, 2 C. L. R., 215, where the convict who had been convicted for murder had attempted to commit suicide by cutting his throat, and there was a risk of decapitation taking place if he were hung, the High Court commuted the sentence of death to transportation for life.

377. In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed, and signed by at least two of them.

Confirmation or new sentence to be signed by two Judges.

Act X of 1872, s. 290.

378. When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such examination and hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure in case of difference of opinion.

Act X of 1872, s. 271B ; Act XI of 1874, s. 22.

379. In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order, under the seal of the High Court, and attested with his official signature, to the Court of Session.

Procedure in cases submitted to High Court for confirmation.

Act X of 1872, s. 301, para. 1.

380. When a sentence passed by an Assistant Sessions Judge or by a District Magistrate acting under section 34 is submitted to a Sessions Judge for confirmation, such Sessions Judge— Ch. XXVI s. 380

Confirmation of sentence of Assistant Sessions Judge or Magistrate acting under section 34.

(*a*) may confirm the sentence, or pass any other sentence which the lower Court might have passed ; or

(*b*) may annul the conviction, and convict the accused of any offence of which the lower Court might have convicted him, or order a new trial on the same or an amended charge ; or

(*c*) may acquit the accused ; or

(*d*) if he thinks further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused to be necessary, he may make such inquiry or take such evidence himself, or direct such inquiry or evidence to be made or taken.

Unless the Court of Sessions otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or evidence taken ; and, when the sentence has been submitted by an Assistant Sessions Judge, such inquiry shall not be made, nor shall such evidence be taken, in the presence of jurors or assessors.

When the inquiry and the evidence (if any) are not made and taken by the Court of Sessions, the result of such inquiry and the evidence shall be certified to such Court.

Compare Act X of 1872, ss. 18 and 36 ; Act XI of 1874, s. 3. As to the last two paragraphs, compare the powers given to High Courts by ss. 375 and 376, *ante*.

The word 'modify,' which was used in the former Code, has been omitted in consequence of the decision in the case of *The Empress* v. *Rama Prema*, I. L. R., 4 Bom., 239, where it was held, that the word did not include the power to enhance a sentence. As to the sentences which may be passed by Assistant Sessions Judges, see s. 31, *ante*, p. 22.

An Additional Judge is not competent to confirm a decision passed by a District Magistrate in exercise of his special powers conferred under s. 34, *supra*.—*Hunar* v. *Empress*, Panjab Rec., 1884, p. 98.

With reference to ss. 31 and 34, *ante*, pp. 22 and 27, the necessity for confirmation of the sentence by the Sessions Judge arises in cases in which the sentence of imprisonment is a sentence of upwards of three years, without including any additional sentences as to fine or whipping.—*In re Shumsher Khan*, I. L. R., 6 Calc., 624.

See *Rongai* v. *Empress*, I. L. R., 9 Calc., 513, and the notes to s. 34, *supra*.

Ch.XXVIII s. 381

CHAPTER XXVIII.

OF EXECUTION.

Execution of order passed under section 376.

381. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

This section corresponds with s. 301, para. 2, of Act X of 1872.

Where the High Court simply modifies a sentence passed by a Sessions Judge without change of section, and where the High Court passes a new sentence by changing the section, or the punishment section or otherwise, the sentence finally passed shall count, unless specially otherwise directed, from the first day of imprisonment under the original sentence.—*Calc. H. C. C. O., 19th Dec.* 1876, *Assam Gazette*, 1877, p. 24, *Wilkins*, p. 120.

With a view to obviate all mistakes, the date of termination of all terms of imprisonment should be distinctly impressed on the warrants of commitment.—*Ibid*, *Wilkins*, p. 120.

Bengal and Assam.—In Bengal and Assam, the date named by the Sessions Court on its warrant for the execution of a sentence of death shall be not less than fourteen, nor more than twenty-one, days from the date of the issue of such warrant. —*Calc. H. C. C. O., No.* 2, *dated 5th May* 1876, *Assam Gazette*, 1875, p. 355, *Wilkins*, p. 120.

Madras.—By a notification of the Madras Government, dated the 23rd May 1873, it was directed that sentences of death should in no case be carried into execution by officers in charge of jails until the 15th day after the day of receipt from the Court of Session of the warrant issued after confirmation of such sentence by the High Court, and that in cases of the Ganjam, Vizagapatam, and Canara Districts, such sentences should not be carried into execution until the 22nd day after the same date.

Bombay.—The following rules regarding the execution of capital sentences have been issued in the Presidency of Bombay:—

(1.) When a sentence of death has to be carried into execution, the Sessions Judge shall make arrangements to secure the attendance thereat of a Magistrate of the first class, or Superintendent or Assistant Superintendent of Police, as specified in the Government Circular No. 382, dated the 30th January 1866, from the Judicial Department; and in the warrant which the Sessions Court issues to the jailor, he shall be directed to carry out the execution in the presence of a Magistrate of the first class, or a Superintendent or Assistant Superintendent of Police.

(2.) When sending a warrant for execution to the jailor, the Sessions Judge shall at the same time inform the Superintendent of the Jail of having done so.—*Bombay Gazette*, 1879, p. 471.

In the Presidency of Bombay, the following Circular Order was issued to the Police Commissioner and Commissioner in Sind:—

Her Majesty's High Court having ruled that the jailor is the officer in charge of the jail, to whom warrants for the execution of capital sentences should be addressed by the Sessions Courts, the Hon'ble the Governor in Council is pleased to direct that every execution shall be attended by a Magistrate with full powers, or by a Superintendent or Assistant Superintendent of Police, and that the officer so attending shall countersign the return of execution to the Court of Session.

On the receipt of a confirmation by Her Majesty's High Court of Judicature of a capital sentence, it should be specified in the warrant addressed to the Jailor, that the execution is not to be carried out until a day therein named, that shall be at least fourteen days from the date of receipt of the order of confirmation.—*Circular No.* 382 *of* 1866.

A separate warrant should be issued in the case of each prisoner.—*Calc. H. C. C. O., No.* 6, *dated* 23*rd February* 1870, *Wilkins*, p. 3; *Madras H. C. Pro.*, 13*th March* 1868, *Weir*, p. 46.

For form of warrant on a sentence of death, see Sched. V, No. 35, and for form of warrant after a commutation of sentence, see Sched. V, No. 36.

The Sessions Court has no power to postpone the execution of a sentence of death confirmed by the High Court.—*Mad. H. C. Pro.*, 4*th June* 1879, *Weir*, p. 37.

Postponement of capital sentence on pregnant woman.

382. If a woman sentenced to death be found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may commute the sentence to transportation for life.

This corresponds with s. 306 of Act X of 1872, and with s. 114 of Act X of 1875, adding the words 'to transportation for life.'

The High Court is the only judicial tribunal in which the law has vested the powers of postponing the execution of a sentence of death confirmed by it.

Thus, where a Sessions Judge, on learning of the pregnancy of a prisoner whose sentence of death was confirmed by the Madras High Court, directed that the sentence should be suspended until forty days after her delivery, the High Court held, that the order was *ultra vires*, and that, in the exigencies of the situation, he should have suspended the execution of the sentence of death until such time as the order of the High Court could be obtained.—*Mad. H. C. Pro.*, 4*th June* 1879, *Weir*, p. 36.

Execution of sentences of transportation or imprisonment in other cases.

383. Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is to be confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

Compare s. 302A, cl. 1, of Act X of 1872 (s. 32 of Act XI of 1874), which, however, applied only to Courts inferior to Courts of Session. Act IV of 1877, s. 183.

A sentence of imprisonment ought to commence from the time the sentence is passed.—*In re Krishnanund Bhuttacharjee*, 3 B. L. R., Ap. Cr., 50.

The following rules are in force in Bombay:—

Every Criminal Court when it passes a sentence of imprisonment or transportation, shall endorse on the back of the warrant with which it forwards the convict to the jail, the following particulars:—

Age of convict:
Caste of ditto:
Place of residence of ditto:
Plea of ditto:
Opinion of the assessors (where the trial has been conducted with the aid of assessors):

If at the trial any previous conviction has been established, the following particulars shall also be given:—

Name of the offence of which the convict was previously convicted:
Sentence passed upon him:
Date of said sentence:
Name and designation of trying authority:

The above particulars shall be written in the same language in which the warrant itself is written.—*Bombay Gazette*, 1879, p. 471.

The signature of a Magistrate to a warrant should not be affixed by a stamp. —*Subramanya* v. *Queen*, I. L. R., 6 Mad., 396; *C. O. No.* 8, 18*th Aug.* 1862, *Wilkins*, p. 119.

Ch. XXVIII s. 384 *Transportation.*—In every case in the Panjab in which a sentence of transportation for life is passed on a woman for the murder of her infant child, the file of the case must, after the expiration of the period allowed for appeal, if it has not been previously submitted, be forwarded to the Registrar of the Chief Court, for submission to the Local Government, with a view to the consideration of the question whether any commutation or reduction of the sentence should be allowed.—*Panjab Gazette*, 1879, Part III, p. 1879.

In all cases in Bengal, where the accused is a soldier or person holding any rank in the army, the warrant for detention or imprisonment shall set forth accurately the rank of the prisoner and the regiment or military department to which he belongs.—*Calc. H. C. C. O., No.* 12 *of* 28*th November* 1873, *Wilkins*, p. 3.

So, in the Panjab, whenever a soldier is committed to jail, whether for trial or under sentence, his military rank shall always be stated in the warrant of commitment, in order that the notice may be given to the military authorities of the day and hour on which the imprisonment of such person will expire, as required by the 33rd clause of the Mutiny Act.—*Smyth*, p. 148.

384. Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined.

Direction of warrant for execution.

Compare s. 303 of Act X of 1872, Act X of 1875, ss. 103 and 104, and Act IV of 1877, s. 184.

The signature of the Magistrate to a warrant should not be affixed by a stamp.—*Subramanya* v. *Queen*, I. L. R., 6 Mad., 396; *C. O. No.* 8, 18*th August* 1882, *Wilkins*, p. 119.

The warrant to be sent to the officer in charge of the jail under s. 385 shall set out in full the sentence passed. So far as the sentence is for imprisonment, the jailor will give effect to the terms of the warrant. Such portion of the sentence as directs imprisonment in default of payment of fine will be carried out into effect by the jailor, subject to the provisions of ss. 68 and 69 of the Penal Code. It is not the duty of the jailor to levy a fine, nor can he receive it. The levy of a fine imposed by a Sessions Judge by distress and sale of the property of the accused is to be made under a special warrant issued for that purpose only under s. 386, and not under a duplicate of the warrant sent to the jailor under s. 385.—*C. O. No.* 1 *of* 9*th February* 1880, *Wilkins*, p. 3.

Sessions Judges are required by s. 386 to furnish Magistrates with copies of their findings and sentences; the copy of the latter should be taken from the record of the trial, and not from the warrant issued to the officer in charge of the jail.—*Calc. H. C. C. O., No.* 12 *of* 21*st February* 1880, *Assam Gazette*, 1880, p. 131.

Warrants of imprisonment directed to Superintendents of District Jails should be in the English language, and warrants directed to the keepers of Subdivisional lock-ups should issue in the vernacular, except where the sentence is for imprisonment of a longer term than fifteen days, in which case the warrants issued by Subdivisional authorities should, if possible, be in English.—*Calc. H. C. C. O., No.* 10 *of* 27*th August* 1873, *Wilkins*, p. 3.

A separate warrant should be issued in case of each prisoner.—*C. O. No.* 6, 23*rd February* 1870, *Wilkins*, p. 3; *Mad. H. C. Pro.*, 13*th March* 1868, *Weir*, p. 46.

In Madras, also, it has been directed that all warrants or orders addressed to officers in charge of jails or magisterial officers shall, wherever practicable, be prepared in the English language (*Mad. H. C. Pro.*, 8*th February* 1867, *Weir*, p. 46), and that all such warrants and orders should be addressed to the officer in charge of the jail and sent direct to him.—*Mad. H. C. Pro.*, 9*th January and* 8*th February* 1867 *and* 13*th March* 1868, *Weir*, p. 46.

A sentence of imprisonment ought to commence from the time the sentence is passed.—*In re Krishnanund Bhuttacharya*, 3 B. L. R., Ap. Cr., 50. A definite period of imprisonment must be stated. Thus, an order directed a person "to

386. Realization of fine after death of
person fined — The liability of the immoveable
property of the deceased person who was fined can
not be enforced by distress but by suit. In
regard to moveables the magistrate can
attach moveables of which the deceased was
sole owner.
The Queen Empress v. Sitanath Mullick I.L.R. 20 C. 478

be imprisoned until he gives security" is bad.—*Mailamdi Fakir* v. *Taripulla Pramanik*, I. L. R., 8 Calc., 644.

In the case of *Shamsonnessa Begum* v. *Love*, I. L. R., 4 Calc., 527, it appeared that a Sheriff's officer delivered over to the officer in charge of the Alipore Jail a judgment-debtor who had been duly committed to the Presidency Jail. It was held that the imprisonment was unlawful.

Warrant with whom to be lodged.

385. When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

This section corresponds with s. 304 of Act X of 1872, omitting the provision that, if the jailor should not be in the jail, the warrant should be lodged with his deputy; and that if he should have no deputy, with any officer then being in the jail. See also Act X of 1875, s. 104.

A separate warrant should be issued in the case of each prisoner.—*C. O. No.* 6 *of* 23*rd February* 1870, *Wilkins*, p. 3.

Warrants of imprisonment directed to Superintendents of District Jails should be in the English language, and warrants directed to the keepers of Subdivisional lock-ups should issue in the vernacular, except where the sentence is for imprisonment of a longer term than 15 days, in which case the warrants issued by Subdivisional authorities should, if possible, be in English.—*C. O. No.* 10 *of* 27*th August* 1873, *Wilkins*, p. 3.

Act V of 1871 contains the following provisions as to prisoners in the mofussil:—

Officers in charge of prisons situate outside the local limits of the ordinary original civil jurisdiction of the High Courts at Fort William, Madras, and Bombay are competent to give effect to any sentence or order or warrant for the detention of any person passed or issued by any Court or tribunal acting under the authority of Her Majesty or of the Governor-General in Council or of any Local Government.—*S.* 16.

A warrant under the official signature of an officer of such Court or tribunal is sufficient authority for holding any prisoner in confinement, or for sending any prisoner for transportation beyond the sea in pursuance of the sentence passed upon him.—*S.* 17.

Any officer in charge of a prison doubting the legality of any warrant sent to him for execution, or the competency of the person whose official seal and signature are affixed thereto to pass the sentence and issue such warrant, shall refer the matter to the Local Government, by whose order in the case such officer and all other public officers shall be guided as to the future disposal of the prisoner. Pending any such reference, the prisoner may be detained in such manner with such restrictions and mitigations as may be specified in the warrant.—*S.* 18.

Warrant for levy of fine.

386. Whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned.

This section corresponds with s. 307, para. 1, of Act X of 1872; see s. 105 of Act X of 1875 and s. 185 of Act IV of 1877.

For form of warrant to levy fine by distress and sale, see Sched. V, No. 37.

Any fee which a Criminal Court orders to be repaid to a complainant under s. 31 of the Court Fees Act, 1870, shall be regarded as a fine, subject to the provisions of s. 308 (s. 545 of this Code) of the Code of Criminal Procedure.—*Bombay Gazette*, 1879, p. 475.

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In the case of *Queen* v. *Jungli Beldar*, 8 B. L. R., Appx., 49, AINSLIE, J., said: "Directly on passing a sentence, which includes a fine leviable by distress, whether that be the only punishment or not, and whether any provision be made for imprisonment on default of payment or not, it shall be lawful for the Magistrate to issue his warrant for the levy of the fine by distress and sale of the goods of the offender—that is, imprisonment and distress may be simultaneously ordered." See *Queen* v. *Modoosoodun Dey*, 3 W. R., Cr., 61.

Procedure for the levy of fines in Bengal.—A warrant issued under s. 386 of the Code of Criminal Procedure for the levy of a fine should be directed to a Police-officer, and the authority issuing it should set a time for the sale and for the return of the warrant. If no one claims the property distrained, the Police have the power of selling it within the time specified in the warrant, without any previous reference to the Magistrate; if a claimant come forward, then the ownership of the property distrained must be determined by the Magistrate and not by the Police. If at any time subsequent to the return to the warrant, and within the period of six years from the passing of the sentence, the fine or any part thereof remains unpaid (s. 70 of Penal Code), and the Magistrate has, from information gained in any way, reason to think that any moveable property belonging to the offender is within his jurisdiction, he should issue a fresh warrant for the attachment and sale of such property. Such warrant should be made returnable within a certain time.—*Calc. H. C. C. O., No.* 8 *of 22nd June* 1864, *Wilkins*, p. 118.

The warrant to be sent to the officer in charge of the jail under s. 385 shall set out in full the sentence passed. So far as the sentence is for imprisonment, the jailor shall give effect to it according to the terms of the warrant. Such portion of the sentence as directs imprisonment in default of payment of fine shall be carried into effect by the jailor subject to the provisions of ss. 68 and 69 of the Penal Code. It is not the duty of the jailor to levy a fine, nor can he be required to receive it. The levy of a fine imposed by a Sessions Judge by distress and sale of the property of the accused is to be made under a special warrant issued for that purpose only under s. 386, and not under a duplicate of the warrant sent to the jailor under s. 385.—*Calc. H. C. C. O., No.* 1 *of 9th February* 1880, *Wilkins*, p. 3.

Madras.—The following orders as to fines have been issued by the Madras High Court:—

(1.) The chief ministerial officer of every Court will be held responsible that, upon the realization of a fine, to the non-payment of which a sentence of alternative imprisonment has been attached, immediate intimation be given to the Jail authorities.—*Mad. H. C. Pro.*, 12*th March* 1867, *Weir*, p. 12.

For procedure when the convict is transferred to another jail, and the fine is realized by the Court which passed the sentence, *vide G. O.*, 19*th April and* 28*th September* 1876, *Weir*, p. 12.

(2.) When a fine is imposed in addition to transportation, and the whole or part of that fine is afterwards levied, the fact should be notified to the authorities of Port Blair.—*Mad. H. C. Pro.*, 12*th November* 1870, *Weir*, p. 12.

(3.) Memorandums showing the amount of all fees, fines, and penalties levied during the month are to be forwarded by every magisterial officer to the District Magistrate on the last day of each month, and a general statement is to be prepared by him and forwarded to the Court of Session. A complete memorandum will then be forwarded by the Court of Session to the High Court.—*Mad. H. C. Pro.*, 21*st December* 1868 *and* 9*th February* 1869. And this memorandum is not superseded by the following proceedings of the High Court, dated 15th December 1874.—*Mad. H. C. Pro.*, 26*th February*, 24*th March, and* 16*th August* 1875, *Weir*, p. 12.

(4.) The following rules relate solely to fines imposed by Criminal Courts:—

(*a*) Fines when paid shall be sent with as little delay as possible to the nearest treasury:

(*b*) On the last day of each month, Magistrates of all grades shall transmit to the Sessions Court, and to the officer in charge of the treasury, a statement in the form prescribed in Appendix II, showing the amount of fines actually levied during the month:

(c) The Sessions Court shall also, on the last day of each month, transmit a statement, in the like form, to the officer in charge of the treasury:

(d) The returns received from the Magistrates shall be compiled in the Sessions Court into a consolidated statement and transmitted to the High Court under flying seal through the officer in charge of the district treasury and the Accountant-General.—*Vide infra*, para. (5), and also *H. C. Pro., 12th March* 1879:

(e) When a sentence of fine is reversed on appeal, an order of refund in the form prescribed in Appendix II shall be granted by the Court reversing the sentence:

(*f*) When a sentence of fine is reversed on a reference to the High Court, the order of refund shall be granted by the Court which referred the proceedings for the orders of the High Court.—*Mad. H. C. Pro., 15th December* 1874, *Weir*, p. 13.

(5.) The consolidated statement of fines referred to in cl. (*d*), *supra*, will be passed on to the High Court, after being checked in the Accountant-General's office, the Sessions Courts being called upon to explain any differences discovered between the statements and the treasury accounts.

When a fine is repaid under an order of refund, the treasury officer shall certify in the refund voucher, that the payment has been made after comparison with, and note on, the consolidated statement. In the absence of such certificate, the Accountant-General will not accept charges for refunds of fines.—*Mad. H. C. Pro., 30th April* 1878 *and* 15*th January* 1879, *Weir*, p. 13.

(6.) Whenever a fine or a portion thereof is awarded as compensation, only the nett amount (if any) of the fine,—that is to say, the amount of the fine, *minus* the amount awarded as compensation,—shall be entered in column 4 of the monthly statement of fines.

Column 3 shall show the amount of fine awarded as compensation, and this amount shall be retained in deposit in the revenue treasury, subject to the order of the Court awarding compensation, or of the Court of Appeal or Revision.

The amount so retained shall be paid to the party entitled to it, on such party producing a certificate from the Court which made the award, to the effect that either the sentence and award have been confirmed on appeal, and that no order has been received from a Court of Revision modifying or reversing the order; or that the appeal time has expired, and that no appeal has been preferred, and that no order has been received from a Court of Revision modifying or reversing the order of compensation.

When the original Court is unable to certify whether or not an appeal has actually been preferred, the party entitled to the compensation may apply to the Appellate Court to certify whether or not any appeal has been preferred, and on such application, the Appellate Court shall grant the required certificate.—*Mad. H. C. Pro., 2nd December* 1878, *Weir*, p. 14.

(7.) A sentence must impose a specific fine on each prisoner; imposing a fine on the prisoners individually and collectively is illegal; certainty is as essential as in a sentence of imprisonment.—*Mad. H. C. Pro., 11th November* 1869, *Weir*, p. 14.

Bombay.—In Bombay, when any Court recovers a fine, or any portion thereof, inflicted upon a prisoner who is already in jail, or who is liable to be further detained in jail in default of payment of that fine, such Court shall be held responsible for the immediate communication to the jailor of the amount of the fine so recovered.—*Bom. Cir., 7th May* 1881.

Although s. 70 of the Indian Penal Code gives the power to levy a fine at any time within six years, neither that section nor s. 307 (386) of the Criminal Procedure Code requires that the power should be exercised in every case. The law is merely permissive, and not imperative. When efforts have been made to realize a fine by distress and sale, and when the offender has undergone the imprisonment awarded in default of payment of fine, the Court should exercise its discretion, according to the circumstances of each particular case, as to whether, after the release of the prisoner, any further steps should be taken towards the realization of the fine within the period allowed by law. If there is reason to believe that the offender was able to pay, and would not, preferring to undergo imprisonment, the law should be strictly enforced; but if it appears that the fine was not paid for want of means, or that its realization would be ruinous to the offender or his family, it is not desirable that further steps should be taken.—*Smyth*, p. 108.

Ch. XXVIII s. 386 With reference to this point, the following order, issued in the Bombay Presidency under the corresponding section of Act X of 1872, is of importance:—

The attention of Sessions Judges and Magistrates is called to s. 70 of the Indian Penal Code and s. 307 (386) of the Code of Criminal Procedure, and to the fact that proceedings are seldom taken to recover fines after the imprisonment in default has expired. If, at any time subsequent to the return of the original warrant and within a period of six years from the passing of the sentence, the fine, or any part of it, remains unpaid, and the Court which passed the sentence, from information gained in any way, has reason to think that any moveable property belonging to the offender is within its jurisdiction, it should issue a fresh warrant for the attachment and sale of that property within a specified period, returnable within a certain time. —*Bom. H. C. Cir. No.* 44, *Bombay Gazette*, 1879, p. 475.

Panjab.—In the Panjab, instructions, of which the following is a summary, have been issued relating to the realization of fines; see *Panjab Gazette,* 1879, pp. 92—99.

Fines should never be excessive with reference to the means of the offender, and the amount imposed should always be distinctly explained to the person sentenced. All fines are leviable by distress within six years, or during the term of imprisonment of the offender, if this be more than six years; but this provision of the law is permissive, and not imperative, and the Court should exercise its discretion as to whether, after the release of the offender, any further steps should be taken towards the realization of the fine, and should not proceed if it appears that the non-payment of the fine was owing to poverty and not to contumacy.

Every Court should keep a separate register of fines in the vernacular in the form marked A, and a general register of fines should be kept at the headquarters of each district.

If at the time of sentence the prisoner tenders the whole or part of the fine, the amount must be received and a receipt given in the form marked E. If paid in full, an entry to that effect must be made on the file of the case.

When fine is the only punishment imposed for a bailable offence, the offender may be allowed a period of grace, not exceeding fourteen days, so as to admit of his making arrangements for the payment of the fine. In default of payment, steps must be taken for imprisonment or realization, as the case may require.

If the fine be not paid in full at the time of sentence or within the period of grace allowed, the Court imposing the fine should proceed as follows:—

In Sessions Courts.

(*a.*) If the fine was imposed by a Court of Session, the Judge should, in the absence of any special directions to the contrary in the law under which the fine was imposed, issue, under s. 307 (386) of the Criminal Procedure Code, a warrant in the annexed form (Appendix B) to the Magistrate of the District for the levy of the amount due by distress and sale of the offender's moveable property. In cases in which the whole or a portion of the fine has been awarded in compensation or reward, this should be distinctly noted in the warrant. The Magistrate of the District to whom the warrant is addressed will, on receipt, cause the particulars to be entered in the proper page of the general fine register, and the District Registrar of Fines will then be responsible that the proper steps, as hereinafter provided, are taken for the realization of the fine.

In Magistrates' Courts, a written order to issue to the police to demand payment.

(*b.*) If the fine was imposed by a Magistrate, and no period of grace has been allowed, a separate written order should, in the absence of any special provision of law to the contrary, be prepared and signed by the Magistrate and sealed with the seal of his Court. This order should be in the annexed form (Appendix C) and should be addressed to the Court Inspector, or Naib Court Inspector, or other official discharging the duties of Court Inspector, where the Court is provided with such an official; otherwise to the officer in charge of the Police-station within whose limits the person sentenced resides.

A copy of the order should also be given to the person sentenced, and he should be informed that, in default of voluntary payment within the period named therein, a warrant to levy the amount by distress will issue. The order, it will be observed, is returnable after fourteen days. If, during that period, the fine is paid in full to the police, the order with an endorsement showing the date of realization and also the date of payment into the treasury with the number of the treasury receipt will

be returned forthwith to the Magistrate, who, when the offender is in prison, will at once notify under his hand and seal the payment to the Superintendent of the Jail. If, on the other hand, the fine is not paid within fourteen days, the warrant will be returned with an endorsement certifying what has been done under it. In either case the work of the police is finished. Ch. XXVIII s. 386

Payments certified by the police will be entered at once in the appropriate columns of the Magistrate's fine register, and the certificate will be attached to the file of the case.

Where a period of grace has been allowed, as provided in para. 8, the Magistrate should, after the expiry of that period, proceed at once to issue a warrant for the distress and sale of the offender's moveable property, instead of issuing an order to the police.

When an order to the police has been issued under the preceding paragraph, and a return has been received thereto that the fine has not been fully realized by the efforts of the police, a warrant should be issued (Appendix D) for the levy of the amount still due by distress and sale of the offender's moveable property. The warrant should, except when issued by a tahsildar for execution in his own tahsil, or as provided by the next paragraph, be addressed to the tahsildar within whose jurisdiction the offender resides. Warrants for levy of fines received by the Magistrate of the District should also be executed through the tahsildars in the same manner as warrants issued by Magistrates.

Warrants issued for execution in cantonments must be executed by the officers of the Cantonment Magistrate's Court.

Formalities are to be observed in attachment, sale, and adjudicating upon objections similar to those in force in the execution of civil decrees. Agricultural instruments should not ordinarily be attached.

When an objector comes forward, he should be warned of the penalties contained in s. 207 of the Penal Code against a fraudulent claim to property to prevent its seizure in satisfaction of fine, and the objection should then be inquired into and disposed of either by admitting the claim or referring the objector to a civil action if his claim seems groundless.

The officer conducting the sale of attached property is entitled to the following commission :—

If the sale-proceeds do not exceed Rs. 5,000, at 5 per cent.

If the sale-proceeds exceed Rs. 5,000, at 5 per cent. on Rs. 5,000, and at ½ per cent. on the remainder.

Fines realized by tahsildars are be reported at once to the Magistrate executing the sentence.

All Magistrates and officers in charge of Police-stations, Tahsildars, and Superintendents of Jails must receive fines when tendered, and give receipts in the form marked E.

Fines may be paid either in the district in which the offender was sentenced, or in the district to which he has been transferred to undergo his imprisonment. Precise directions are given as to how sums received by judicial officers and the police in payment of fines are to be disposed of.

Directions are also given as to the observance of the orders of the account department, the duties of the District Registrar of Fines, the returns to be submitted to the Sessions Judge, and the duties of Superintendents of Jails on receiving intimation of the payment of fines.

A careful observance of the foregoing directions will result in the following checks :—

I. Every fine imposed by Courts exercising jurisdiction in the district will be entered in the fine register.

II. When the fine has been paid into Court, the fact will appear in the proper register under the hand of the Judge or Magistrate, and on the file of the case.

III. When the police have realized a fine in whole or in part, a certificate of what has been done will be with the record, and the amount realized will appear in the fine register.

IV. When the police have not realized the fine, this fact will appear from the record, and the subsequent proceedings of the tahsildar will show what steps have been taken for forcible levy.

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V. Each realization will be checked by the District Registrar of Fines.

VI. The realization of each Court will be checked and certified once a month by the presiding officer of the Court, or in the case of fines imposed by the Sessions Court, by the Magistrate of the District.

VII. An inspection of the district register of fines will always at once show every stage of each transaction, and if thought proper, quarterly, half-yearly or annual audits can be held of the whole fine transactions of the period by comparing each entry of the register with the record of the case and the credit in the treasury. The officer in charge of the fine department should occasionally test the correctness of the entries in the district fine register by comparing some of them with the records of the cases to which they relate and with the credits in the treasury.

Effect of such warrant.

387. Such warrant may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the distress and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

This section consolidates the provisions of s. 307, para. 2, of Act X of 1872, and s. 185, para. 2, of Act IV of 1877. See s. 105 of Act X of 1875.

See notes to preceding section.

Suspension of execution of sentence of imprisonment.

388. When an offender has been sentenced to fine only, and to imprisonment in default of payment of the fine, and the Court issues a warrant under section 386, it may suspend the execution of the sentence of imprisonment and may release the offender on his executing a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before such Court on the day appointed for the return to such warrant, such day not being more than fifteen days from the time of executing the bond; and in the event of the fine not having been realized, the Court may direct the sentence of imprisonment to be carried into execution at once.

See s. 185 of Act IV of 1877.

Under this section, the Court, in a case where an offender has been sentenced to fine only, and to imprisonment in default of payment of fine, has power to suspend the execution of the sentence of imprisonment and release him on his furnishing security. In the event of the fine not being paid, the Court may direct the sentence of imprisonment to be carried into effect. The provisions of the section are new.

Form of process, sentence, and order.—(*a.*) In every sentence or order made by a Criminal Court, the jurisdiction of the Judge or Magistrate making it should distinctly appear on the face thereof.*

(*b.*) In every process and every sentence or order (of whatever description) issued by a Judicial Officer, for whatever purpose it may be issued or made, the name of the District and of the Court from which the same is issued, and also the name and powers of the officer issuing or making it, shall be clearly set out in such manner that it may be easily read.

* When the law empowers Magistrates of a particular grade to do a particular act or make a certain order, it should always appear on the proceedings that the Magistrate making the order or doing the act is a Magistrate who had jurisdiction to do it.—(22 W. R., Cr. R., 30.)

(c.) Judicial Officers shall in all cases take care to sign their names distinctly and legibly.—*C. O. No.* 4 *of* 13*th March* 1876, *Wilkins*, p. 119. Ch. XXVIII secs. 389-390

(d.) At the request of the Government of Bengal, all Judicial Officers are reminded that, in the case of all documents which are required by law to be *signed*, the impression of a stamp bearing the officer's name is insufficient and illegal.—*C. O. No.* 8 *of* 18*th August* 1882, *Wilkins*, p. 119. See *Subramanya* v. *Queen*, I. L. R., 6 Mad., 396.

Section 69 of the Penal Code provides:—

If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration.

A is sentenced to a fine of one hundred rupees, and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

389. Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence or by his successor in office.

Who may issue warrant.

This section corresponds with s. 307, last paragraph, of Act X of 1872, and s. 185, last sentence, of Act IV of 1877. See *Chunder Coomar Miller* v. *Modhoosoodun Dey*, 9 W. R., Cr., 50.

390. When the accused is sentenced to whipping only, the sentence shall be executed at such place and time as the Court may direct.

Execution of sentence of whipping only.

This section corresponds with s. 302A, cl. 2, of Act X of 1872, and Act XI of 1874, s. 32. See s. 183 of Act IV of 1877.

Under s. 394, *post*, a sentence of whipping must not be imposed unless the offender is in a fit state of health, and under s. 393 cannot be inflicted by instalments.

Sentences of whipping as a sole punishment in the North-Western Provinces, ordered by any Magistrate, are to be carried out, at the court-house of the Magistrate of the District, in the presence of the Magistrate or medical officer at a fixed time at the close of each day. The flogging is to be inflicted with as much privacy as may be practicable.—*N. W. P. Gazette*, 1878, p. 718.

Section 1 of Act VI of 1864 (the Whipping Act) directs that, in addition to the punishments described in s. 53 of the Penal Code, offenders are also liable to whipping under the provisions of the said Code, and it has been declared under the authority vested in the Lieutenant-Governor by s. 392 of Act X of 1882, that this punishment "shall, in the case of an adult," be inflicted on the breech with a ratan* not exceeding half an inch in diameter. The Government further enjoins that "on all occasions precautions should be taken to prevent the blows from falling on any other part of the person."—*Calc. H. C. C. O., No.* 2 *of* 8*th April* 1864, *Wilkins*, p. 148.

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* Circular of the Government of Bengal to all Commissioners, No. 1329, dated 29th February 1864.

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The following rules are in force in the Panjab :—

The triangle should be boarded on the side next the offender, so as to prevent the possibility of the ratan curling round and touching the front or any other part of his person.

The punishment is never to be inflicted in public, or in front of the cutcherry, but always within some walled enclosure, either the jail, lock-up, treasury or any other convenient place, and in presence of a Magistrate, and, when practicable, of a medical officer. Superintendents of Jails have been invested by the Local Government with powers of a Magistrate of the third class with a view to sentences of whipping being executed in their presence.—*Smyth*, p. 115.

Execution of sentence of whipping, in addition to imprisonment.

391. When the accused is sentenced to whipping in addition to imprisonment in a case which is subject to appeal, the whipping shall not be inflicted until fifteen days from the date of the sentence, or, if an appeal be made within that time, until the sentence is confirmed by the Appellate Court: but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

Compare s. 310 of Act X of 1872, and Act IV of 1877, s. 187. As to the last paragraph, see s. 311 of the same Act as amended by Act XI of 1874, s. 33.

The following rule is in force in Bombay :—

In returns to writs in cases wherein the punishment of whipping has been awarded in addition to imprisonment, it should be certified whether the whipping has been actually inflicted.—*Bombay Gazette*, 1879, pp. 471, 475.

When a sentence has been carried into effect in the presence of the Magistrate who passed it, it is the duty of the Magistrate to record the fact.—*Mad. H. C. Pro.*, *15th July* 1864, *Weir*, p. 47.

In the Panjab, all Superintendents of Jails are invested with the powers of a Magistrate of the third class, with a view to sentences of whipping being executed in their presence.—*Panjab Gazette*, 1873, p. 76.

Mode of inflicting punishment.

392. In the case of a person of, or over sixteen years of age, whipping shall be inflicted with a light ratan not less than half-an-inch in diameter, in such mode, and on such part of the person, as the Local Government directs ; and, in the case of a person under sixteen years of age, it shall be inflicted in the way of school-discipline with a light ratan.

Limit of number of stripes.

In no case shall such punishment exceed thirty stripes.

As to the first paragraph, compare Act X of 1872, s. 311, para. 1 ; Act X of 1875, s. 108 ; Act IV of 1877, s. 188. The provision as to the size of the ratan is new.

See note to s. 390, *supra*, 351. As to the last paragraph, compare Act X of 1872, s. 311, para. 2.